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THE
LAW REPORTS
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THE INCORPORATED COUNCIL OF LAW REPORTING
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Published by the Incorporated Council of Law Reporting for England and Wales · 3 Stone Buildings, Lincoln's Inn, London, W.C.2, and printed by The Eastern Press, Ltd., London and Reading

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 2 (1), 12, 58 - - - - **Divl.Ct. 1**

1952

Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 25 (3) **C.A. 357**

1953

Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 48 (4) (5) - - - **Divl.Ct. 276**

—— —— *s.* 100 (1) (*b*) - - **Divl.Ct. 84**

1957

Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11 (1) **C.A. 290**

—— —— *s.* 11 (2), *proviso* - - **C.A. 25**

1958

Landlord and Tenant (Temporary Provisions) Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 68), *ss.* 1, 3 (1) - - - - - **C.A. 290**

UNITED STATES OF AMERICA

1936

Carriage of Goods by Sea Act of United States, 1936, *ss.* 1 (*a*), 4 (5) - **Diplock J. 171**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Docks Regulations, 1934 (*S.R. & O.*, 1934, *No.* 279), *reg.* 11 (1) **Lord Parker C.J. 14**

—— —— *rr.* 37, 45 - - - **C.A. 194**

County Court Rules, 1936 (*S.R. & O.*, 1936, *No.* 626), *Ord.* 23, *r.* 3 - **C.A. 211**

—— —— *Ord.* 25, *r.* 48; *Ord.* 37, *rr.* 1, 2 **Divl.Ct. 145**

Protection of Eyes Regulations, 1938 (*S.R. & O.*, 1938, *No.* 654) - - **C.A. 300**

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 31 (1) - - - **C.A. 138**

R.S.C., *Ord.* 11, *r.* 1 (*e*) - - - **C.A. 57**

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

KAHN *v.* NEWBERRY.

1959
April 10, 13.

Lord Parker C.J., Donovan and Salmon JJ.

Shop—"Place" in which retail trade carried on—Mobile trader—Weekday closing—Costermonger's barrow—Whether "any place "not being a shop"—Whether distinction between Sunday and weekday closing—Whether piece of ground constituted "place" by casual retail sale—Degree of permanency necessary—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 2 (1), 12, 58.

Evidence—Judicial notice—Object—Judicial notice that costermonger's barrow moves.

Judicial Precedent—Scottish decision—Construction of common statute—Shops Acts.

Between 10.20 and 10.25 p.m. on a weekday the defendant was standing beside a stationary costermonger's barrow on a pitch in a London street when he sold apples to two different customers. He was convicted of unlawfully carrying on a retail trade or business in a "place" not being a shop at a time when it would be unlawful to keep a shop open for the purposes of a retail trade or business contrary to section 12 of the Shops Act, 1950. On appeal:—

Held, that the sales were not carried on in a "place" within the meaning of section 12 and that, accordingly, no offence had been committed.

There was no distinction between the costermonger's barrow and the mobile van in *Stone* v. *Boreham* (infra), for it required more than a casual sale to constitute a piece of ground a place where a retail trade or business was carried on. Nor could any distinction be drawn in that respect between the wording of sections 12 and 58 of the Shops Act, 1950, both of which contemplated a degree of permanency and, therefore, the court was bound by the English decisions under section 58 of the Act of 1950 and section 13 of the Shops (Sunday Trading Restriction) Act, 1936, which it re-enacted, and should not follow the Scottish decisions under section 12 of the Act of 1950 and section 9 of the Shops Act, 1912.

Stone v. *Boreham* [1959] 1 Q.B. 1; [1958] 3 W.L.R. 209; [1958] 2 All E.R. 715 and *Eldorado Ice Cream Co. Ltd.* v. *Keating* [1938] 1 K.B. 715; 58 T.L.R. 356; [1938] 1 All E.R. 330 applied.

Nixon v. *Capaldi*, 1949 S.C.(J.) 155 and *Cowlairs Co-operative Society Ltd.* v. *Glasgow Corporation*, 1957 S.C.(J.) 51 not followed.

Quaere: Whether, had the barrow had a fixed location, it would have been a "place" within the meaning of sections 12 and 58 of the Act of 1950.

CASE STATED by London Sessions Appeals Committee.

The defendant, Bidrich Kahn, appealed to quarter sessions against his conviction, by Westminster justices, on a summons laid by Edwin Walter Newberry (a duly authorised officer acting on behalf of the London County Council) alleging that he, on May 6, 1958, in a place not being a shop, namely, a pitch on the east side of Great Windmill Street, W.1, did unlawfully carry on a retail trade or business after the hour of 8 p.m., being a time when it would be unlawful in that locality under section 2 of the Shops Act, 1950, to keep a shop open for the purposes of retail trade or business, contrary to section 12 of the Act,[1] the retail trade or business (the sale of apples) not being a transaction mentioned in the Second Schedule to the Act.

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[1] Shops Act, 1950, s. 2 (1) (as amended by the Shops (Revocation of Winter Closing Provisions) Order, 1952 (S.I. 1952, No. 1862)): "Every "shop shall be closed for the serving "of customers . . . not later than nine "o'clock in the evening on the late "day and eight o'clock in the evening "on any other day of the week; . . ."

S. 12: "It shall not be lawful in "any locality to carry on in any "place not being a shop retail trade "or business of any class at any "time when it would be unlawful in "that locality to keep a shop open "for the purposes of retail trade or "business of that class, and, if any "person carries on any trade or business in contravention of this "section, this Part of this Act and "the provisions in Part V for the "enforcement of this Act shall apply "as if he were the occupier of a shop "and the shop were being open in "contravention of this Part of this "Act."

The following were among the facts found by quarter sessions. On May 6, 1958, the defendant between 10.20 p.m. and 10.25 p.m. was standing beside a stationary costermonger's barrow on a pitch in Great Windmill Street, W.1, on the east side about five yards north of the junction of Coventry Street, W.1, when he sold several apples to two different customers. The defendant was carrying on a trade or business not being a transaction mentioned in the Second Schedule to the Shops Act, 1950. The costermonger's barrow was not a moving vehicle.

It was contended for the defendant that the costermonger's barrow was a moving vehicle and as such was not liable to the provisions of the Act of 1950.

It was contended for the prosecutor that a stationary costermonger's barrow was not a moving vehicle and was a place within the meaning of sections 2 and 12 of the Shops Act, 1950, and that the pitch on which retail trade or business was carried on from a stationary costermonger's barrow was a place within the meaning of those sections.

Quarter sessions were of the opinion that the defendant was engaged in carrying on a retail trade or business after 8 p.m. in a place not being a shop in a locality where it was unlawful to keep open a shop for the purposes of retail trade or business and, accordingly, dismissed the appeal.

The defendant appealed.

Paul Wrightson for the prosecutor. The defendant was carrying on a retail trade or business in a "place not being a "shop" within the meaning of section 12 of the Shops Act, 1950. In *Eldorado Ice Cream Co. Ltd.* v. *Keating*[2] this court held that a movable box-tricycle was not a "place" within section 13 of the Shops (Sunday Trading Restriction) Act, 1936, but in *Nixon* v. *Capaldi*,[3] a case relating to weekday trading under the Shops Act, 1912, the Court of Justiciary held that "place" in section 9 of that Act was not limited in its application to places of a permanent or quasi-permanent nature with a definite location but applied also to vehicles which moved about the street, and expressed some criticism of the English decision in the *Eldorado* case[4]: see the judgment of Lord Thomson L.J.-C.[5] The Shops Act, 1912, applied to both England and Scotland, whereas the Shops (Sunday Trading Restriction) Act, 1936, applied only to England. The Shops Act, 1950, a consolidating statute which re-enacted, in sections 12 and 58 respectively, section 9 of the Act of 1912 and section 13 of the Act of 1936 in the same language, applies to both England and Scotland, and in *Cowlairs Co-operative Society Ltd.* v. *Glasgow Corporation*[6] the Court of Justiciary held that the carrying on of trade from a mobile van on a vacant piece of land other than during the permitted hours was in contravention of section 12 of the Act of 1950. Subsequently, in *Stone* v. *Boreham*,[7] a Sunday trading case under section 58 of the same Act, this court considered itself bound by the decision in *Eldorado Ice Cream Co. Ltd.* v. *Keating*.[8] There have, therefore, been two decisions in Scotland upon the provisions relating to weekday trading and two decisions in this country upon the Sunday trading provisions. This is the first time that a case under the weekday trading provisions has come before an English court, and it is submitted that, so far as those provisions are concerned, this court should follow the Scottish decisions. It may well be that in this respect there is a difference between weekday and Sunday trading: see the distinction drawn by Lord Thomson L.J.-C. in *Nixon* v. *Capaldi*[9] that the *Eldorado* case proceeded "on a different statute designed "for a different purpose." Further, section 13 of the Act of 1936 was wider in its terms than the provision, now contained in the Act of 1950, construed by the Court of Justiciary in *Nixon* v. *Capaldi*.[10] Section 13 (now section 58 of the Act of 1950) extended the provisions of the Act to "any place where any retail "trade or business is carried on as if that place were a shop," whereas section 9 of the Act of 1912 (now section 12 of the Act of 1950) made it unlawful "to carry on in any place not being a "shop retail trade or business."

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[2] [1938] 1 K.B. 715; 58 T.L.R. 356; [1938] 1 All E.R. 330.

[3] 1949 S.C.(J.) 155.

[4] [1938] 1 K.B. 715.

[5] 1949 S.C.(J.) 155, 158.

[DONOVAN J. Both provisions refer to a place where retail trade or business is carried on. In *Stone* v. *Boreham*[11] it was said that a retail trade or business was not carried on from a mobile van, and in this respect the wording of the two provisions is the same.]

In the *Eldorado* case[12] the court does not appear to have had in mind the definition of "shop" now contained, in the same terms as in the Acts of 1912 and 1936, in section 74 of the Act of 1950, as including "any premises where any retail trade or

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[6] 1957 S.C.(J.) 51.

[7] [1959] 1 Q.B. 1; [1958] 3 W.L.R. 209; [1958] 2 All E.R. 715.

[8] [1938] 1 K.B. 715.

[9] 1949 S.C.(J.) 155, 158.

[10] 1949 S.C.(J.) 155.

[11] [1959] 1 Q.B. 1.

[12] [1938] 1 K.B. 715.

"business is carried on." It is appreciated that in *Stone* v. *Boreham*[13] the court considered itself bound by the *Eldorado* case,[14] but Lord Goddard C.J.[15] seems to suggest, and Slade J.[16] said in terms that, had the matter been res integra, their decision would have been different. The basis of the decision in *Stone* v. *Boreham*[17] was that it was impossible to distinguish a mobile van from a tricycle, and it was held that the piece of ground on which the mobile van stopped was not a place where retail trade or business was carried on. The distinction drawn by Devlin J.[18] between a place where retail trade or business is carried on in the ordinary sense of the words and a place where a trader happens to effect a casual sale in the course of his business does not apply to this case; here there is no place where the business is carried on other than from the barrow.

In both *Nixon* v. *Capaldi*[19] and *Cowlairs Co-operative Society Ltd.* v. *Glasgow Corporation*[20] it was pointed out that the object of the section was to close shops and to prevent shopkeepers from setting up trestles outside their closed shops and selling from them. That is a consideration which applies here; the defendant had a pitch from which he traded in the same way as would a shopkeeper who had set up a trestle outside his shop.

[The defendant informed the court that the barrow was licensed to a particular area and that the barrow was not stationary, since, if it were, it would cause an obstruction.]

It has often been pointed out that a statute which applies to both England and Scotland should be construed in the same way in both countries, and it is submitted that this court should adopt the construction given to this section by the Scottish court. It would be absurd if to trade in this way was an offence in Scotland but not in England. Moreover, where a statutory provision which has been construed by a superior court is re-enacted or consolidated in the same words, the legislature is deemed to have known of and to have endorsed the meaning given it by that court. In re-enacting these provisions in 1950, therefore, the legislature must be deemed to have known and approved of the decision in *Nixon* v. *Capaldi*[21] on the one hand and in *Eldorado Ice Cream Co. Ltd.* v. *Keating*[22] on the other, and to have endorsed the constructions given them. This court, therefore,

[13] [1959] 1 Q.B. 1.

[14] [1938] 1 K.B. 715.

[15] [1959] 1 Q.B. 1, 7.

[16] Ibid. 8.

[17] Ibid.

[18] Ibid. 10.

[19] 1949 S.C.(J.) 155.

[20] 1957 S.C.(J.) 51.

[21] 1947 S.C.(J.) 155.

[22] [1938] 1 K.B. 715.

is bound by the Scottish decision in regard to section 12 in the same way as a Scottish court would be bound by the English decision under section 58. In any event, the *Eldorado* case[22] and *Stone* v. *Boreham*[23] should be distinguished. A barrow on a licensed pitch is not comparable to a tricycle or a mobile van. This is not a case of an itinerant costermonger or hawker, but of a barrow on a pitch, and, even if the barrow is moved along occasionally to avoid the attention of the police, there is a sufficient degree of permanency to constitute a "place" within the section. The object of this legislation is to protect shopkeepers who have closed their shops in obedience to the law from other persons effecting sales from barrows or trestles.

The defendant, in person, was not called upon.

LORD PARKER C.J. I will ask Donovan J. to give the first judgment.

DONOVAN J. This is an appeal by way of case stated from a decision of the Appeals Committee of the London Sessions dismissing an appeal by the defendant against his conviction by the Westminster justices for trading in contravention of the terms of section 12 of the Shops Act, 1950.

The case finds that the defendant on May 6, 1958, sold apples from a barrow which was stationary at the time in Great Windmill Street. Section 12, so far as is relevant for present purposes, provides: "It shall not be lawful in any locality to "carry on in any place not being a shop retail trade or business "of any class at any time when it would be unlawful in that "locality to keep a shop open for the purposes of retail trade "or business of that class." Section 2 of the same Act makes it unlawful for a shop to keep open for the serving of customers after nine o'clock in the evening on the late day and eight o'clock on any other day. The defendant, however, was serving apples from his barrow in Great Windmill Street between 10.20 p.m. and 10.25 p.m.

The appeals committee find that this business was not one of those exempted from the closure provisions of the Act by the Second Schedule, and they further find that the defendant's costermonger's barrow was not a moving vehicle. Without giving reasons the appeals committee decided that the defendant was in breach of section 12 and dismissed his appeal.

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[22] [1938] 1 K.B. 715.

[23] [1959] 1 Q.B. 1.

He now contends that they should have allowed it, and he relies upon the recent decision of this court in *Stone* v. *Boreham.*[1] Prior to that decision there were other cases on the same or a similar point, two in Scotland and one in England. In 1938 this court decided *Eldorado Ice Cream Co. Ltd.* v. *Keating*[2] and held that a movable box-tricycle from which ice cream was being sold was outside the relevant provisions of the Shops (Sunday Trading Restriction) Act, 1936. Section 11 (1) of that Act provided: "... No person shall be employed on Sunday "about the business of a shop which is open for the serving "of customers on that day unless the following requirements "are complied with," and then followed certain requirements which provided for extra time off for the employees. Section 13 of the same Act provided: "... The provisions of this Act shall "extend to any place where any retail trade or business is "carried on as if that place were a shop."

This court in the *Eldorado* case[3] was dealing with a decision by the justices that "each of the two box-tricycles from which "sales were so made was 'a place' where retail trade or business was carried on within section 13 ... and, therefore, was "to be treated as a shop." The court held that that was wrong and that the box-tricycle was not such a place. Lord Hewart C.J. in giving the decision of this court said[4]: "The contention "is boldly made, not that the warehouse was a 'shop' or that "the particular spot at which at a given time a box-tricycle "was to be found was a 'shop,' but that each of the movable "box-tricycles itself was a 'place' within the meaning of section "13 'where retail trade or business was carried on.' The Act "of 1936 begins with a provision about the closing of shops and "the serving of customers in shops, and section 11 contains the "words"—and then he quotes them—"It becomes clear, when "one looks at the whole scheme and purpose of the Act, that "it is essential that the place where the employment is carried "on, to be a 'place' within section 13, must be either a shop "or premises akin to a shop. Section 13 does not provide that "any retail sale, wherever it may be made, shall come within "the meaning of the Act. It does not prohibit the transaction "of selling by retail. To re-read section 11 as the argument "seeks to extend it is to produce some such result as that 'no

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[1] [1959] 1 Q.B. 1; [1958] 3 W.L.R. 209; [1958] 2 All E.R. 715.

[2] [1938] 1 K.B. 715; 58 T.L.R. 356; [1938] 1 All E.R. 330.

[3] [1938] 1 K.B. 715.

[4] Ibid. 721.

"'person shall be employed on Sunday about the business of "'a box-tricycle which is open for the serving of customers on "'that day unless the following requirements are complied with.' "But the terms of section 13 are that the 'place' referred to "in that section is 'any place where any retail trade or business "'is carried on,' not merely the apparatus by means of which, "or the thing through which, any trade is carried on. So, in "proviso (*b*) to section 13 are found the words 'persons wholly "'or mainly employed in connection with the retail trade or "'business carried on thereat,' that is, at a shop. Throughout "these sections one finds words which connote defined and fixed "locality and position and one also finds in the schedule to "the Shops Regulations, 1937, made under the Act, that the "Form of Record of Sunday Employment and Holidays to be "kept under section 12 of the Act requires (inter alia) that the "address of the shop or place should be stated. What would "be the address of the box-tricycle?" Then he went on to say that the box-tricycle was not such a place, and the appeal was allowed.

Eleven years later, in 1949, *Nixon* v. *Capaldi*[5] came before the Court of Justiciary in Scotland. That arose under the provisions of section 9 of the Shops Act, 1912, which provided: "It "shall not be lawful in any locality to carry on in any place not "being a shop retail trade or business of any class at any time "when it would be unlawful in that locality to keep a shop "open for the purposes of retail trade or business of that class." It may be noted at the outset that this Act was not dealing simply with Sunday trading as was the Act of 1936 under which the *Eldorado* case[6] arose. But it is difficult to see any material difference in the wording of the respective sections. The Act of 1936 by section 13 was also dealing with a place not being a shop, because the section provides that the Act shall apply "as if that place were a shop." Furthermore, the kind of "place" which each Act has in view is described in similar language. In each case it must be a place where retail trade or business is carried on. The Court of Justiciary held that in selling ice cream from a mobile van outside permitted hours the defendant Capaldi was in breach of section 9 of the Act of 1912 because, in their view, he was carrying on a retail trade or business in a place not being a shop. The Court of Justiciary were obviously not impressed with the English decision in the *Eldorado* case [6] and certain distinctions were tentatively suggested. Thus, Lord Mackay said [7]: "I agree with what "your Lordship has said about that decision. It dealt with a "wholly different and English Act. The statute in England was "not dealing with the closing of shops in order that employees "should not be over-employed or with any similar topic. It "dealt with releasing Sunday trading restrictions under old "English Acts, and that a releasing only to a limited extent. "It may be that the same words 'place other than a shop' "have to receive one construction in a Scottish statute and a "different construction in an English statute, inasmuch as each "of these statutes deals with quite a different evil. If, however, "it should fall to me to choose between the reasoning of the "two learned sheriffs in Scotland and that of the Lord Chief "Justice in England, I should certainly agree with the Scottish "decisions, in respect, inter alia, that they correctly bring into "play the main purpose of the statute and the mischief it is "supposed to remedy." The reference there to the two sheriffs refers to two previous decisions by such sheriffs similar to that of the Court of Justiciary in the subsequent case of *Nixon* v. *Capaldi*.[8]

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[5] 1949 S.C.(J.) 155.

[6] [1938] 1 K.B. 715.

I have set out above the language of the relevant sections in each of the two statutes from which, as I have said, it is difficult to detect any difference which is crucial.

Then came another case in Scotland, namely, *Cowlairs Co-operative Society Ltd.* v. *Glasgow Corporation*.[9] That did arise under the Shops Act, 1950, which consolidated the various statutes on this subject-matter. The co-operative society were also prosecuted under section 12, as is the defendant in this case, and it was held that in carrying on a retail grocery trade from a mobile shop on a vacant piece of land held on a ninety-nine year lease on a half day when other grocers' shops had to be closed in the locality, the society was in contravention of section 12. The van was towed to the vacant land each morning and towed back to its garage at night. The society argued that there was sufficient permanence about the arrangement to constitute the van "a shop" and it was therefore not within the scope of section 12 which refers to "any place not being a shop." This argument the Court of Justiciary rejected, holding that the fundamental idea in the definition of a shop for the purposes

[6] [1938] 1 K.B. 715.
[7] 1949 S.C.(J.) 155, 160.
[8] 1949 S.C.(J.) 155.
[9] 1957 S.C.(J.) 51.

of the Act was that the trading must be carried on from premises and the van could not be regarded as "premises." There was a subsidiary argument for the society based on the right to elect for early closing on Saturday, which is not relevant here. There was naturally no argument to the effect that the van was not "a place from which retail trade or business was carried on" because the contrary had already been decided in Scotland in *Nixon* v. *Capaldi.*[10]

Finally, last year this court decided *Stone* v. *Boreham.*[11] That arose under sections 58 and 74 of the Shops Act, 1950. Section 58 reproduced the effect at any rate of section 13 of the Sunday trading Act of 1936. The section is found in Part IV of the Act dealing with Sunday trading, and it provides that with certain specified exceptions, which are not here material, "The foregoing provisions of this Part of this Act . . . "shall extend to any place where any retail trade or business "is carried on as if that place were a shop." Then section 74 (1) defines "shop" as including "any premises where any "retail trade or business is carried on." Accordingly a "place" where such trade is carried on, even if it is not a shop within the definition, for example because there are no "premises," is to be treated as if it were a shop for the purposes of section 58. In *Stone* v. *Boreham*[11] a mobile van equipped as a mobile shop and stocked with a variety of goods stopped in a street on a Sunday and the owner sold a packet of tea to a customer standing in the roadway. If the mobile van or the site it occupied were "a place where any retail trade or business is carried "on" within the terms of section 58 an offence was committed (see section 47 of the Act). The argument for the appellant in that case was not that the van was such a place, because that contention was precluded by the decision in the *Eldorado* case,[12] but that the ground upon which the van rested at the time was such a place. That argument likewise failed, and Lord Goddard C.J. said[13]: "I say at once, both with regard to the "definition of 'shop' in section 74 and section 58, that the "effect of those sections is not to say that a retail trade or "business is carried on in a mobile shop. At a mobile shop "no doubt retail sales are made, but that is different from "saying that a retail trade or business is carried on. A man "carries on business from an address. I do not think those

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[10] 1949 S.C.(J.) 155.

[11] [1959] 1 Q.B. 1.

[12] [1938] 1 K.B. 715.

[13] [1959] 1 Q.B. 1, 7.

"words apply to a mobile van of this sort. It is unnecessary to "examine in detail the various Shops Acts or the Scottish cases "on this subject, because in my opinion the decision of this court "in *Eldorado Ice Cream Co. Ltd.* v. *Keating*,[14] on which the "justices relied, is binding on us. Whether, if the case was "res integra, we might come to a different decision I need not "inquire." He went on to say that it would be really fanciful to distinguish the *Eldorado* case [14] on the ground that there the court was concerned with the box-tricycle itself whereas here it was concerned with the ground upon which the mobile van stood, and with that view Slade and Devlin JJ. agreed. It should be said, however, that Slade J. remarked [15] that if the matter had been res integra he would have decided otherwise, being impressed by the Scottish decision in *Nixon* v. *Capaldi*.[16] Devlin J., on the other hand, preferred the English decision in the *Eldorado* case [17] to that in *Nixon* v. *Capaldi* [18] for reasons which he gave in these terms [19]: "The Act is to extend not to any place where "the sale happens to be effected but to a place where the retail "trade or business is carried on. Here the place is alleged to "be an area in Peterhouse Crescent, Woodbridge, situate outside "No. 106. It might also have been a dozen or a score of "similar places where other sales happened to be effected. Is "that a place where any retail trade or business is carried on? "Is each of them such a place? I think so to hold would be "to strain the meaning of the Act in order to produce a result "that is not in accordance with common sense. There are "many sections of the Act which seem to me to make it clear "that section 58 has in mind a place where business is carried "on in the ordinary sense of the word and not where any trader "happens to effect a sale in the course of his business, there "being to my mind a clear distinction between the two. No "better section could be introduced as illustrative of that than "the very section under which this prosecution was brought, "section 47, which says: 'Every shop shall, save as otherwise "'provided by this Part of this Act, be closed for the serving "'of customers on Sunday.' The requirement of closure makes "it plain that the place is something which is fixed, a place "where business is carried on, and not a place where a casual "sale happens to be effected. I think the ordinary man could

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[14] [1938] 1 K.B. 715.
[15] [1959] 1 Q.B. 1, 8.
[16] 1949 S.C.(J.) 155.
[17] [1938] 1 K.B. 715.
[18] 1949 S.C.(J.) 155.
[19] [1959] 1 Q.B. 1, 10.

"not make sense of a requirement of the law that he was "required in the words of this information to close a place being "a part of Peterhouse Crescent outside the dwelling-house No. "106. I think it is very undesirable that this court should strain "to give meanings to a section of the Act which would produce "a result incomprehensible to the traders who have to deal with "it. The result is, I think, that it must now be taken as "definitely decided in these courts that a mobile van is not a "shop within the meaning of the Shops Act, 1950, and if "Parliament desires to make it so it must introduce new legislation for that purpose."

Although, in the case now before us, the appeals committee found that the defendant's barrow was not a moving vehicle, it is common knowledge that a costermonger's barrow is something on wheels and is pushed about. The committee can, I think, mean no more than this, that the barrow was not moving at the time of the sale, which is in no sense a decisive consideration and, although this is not in the case, the defendant tells us, and we can well believe it, that he has to move about, particularly on the appearance of a policeman. If the barrow is treated as a mobile counter, I can see no relevant distinction between the present case and *Stone* v. *Boreham*.[20] Mr. Wrightson says that that decision and the decision in the *Eldorado* case[21] were decisions dealing with Sunday trading, whereas the two Scottish decisions and the present case deal with weekday trading, and different statutes at any rate originally were involved. That is quite true. For that reason I have referred to the actual wording of the respective provisions and I find no such difference as would, in my opinion, justify this court in not following the decision in *Stone* v. *Boreham*.[22]

Two things, perhaps, might finally be said. First, the present case is not one where a stall is regularly erected on the same piece of land so that an aspect of some permanency is given to the site as one where goods are regularly sold by retail. It may be that such a place would be within the language of section 12 and section 58 of the Shops Act, 1950. That case can be left to be decided if and when it arises. Secondly, the case of the itinerant hawker is not, in my view, the case which Parliament had in mind in passing the various Shops Acts. I say that because of the language of those Acts, which, as has been pointed out before in this court, seems to contemplate shops in the ordinary sense of the word, and other places not being shops but with sufficient aspect of permanence about them to warrant them being treated as shops, and also because, although this court held over 20 years ago that a mobile selling vehicle was not within the Shops Act, Parliament has taken no steps to bring such a contrivance within this legislation. In Scotland it would seem that the view has been taken that no undue straining of the words of the Acts is required to achieve this result. In England the opposite view has prevailed. I think that the court must follow the English view and that involves that this appeal must be allowed.

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[20] [1959] 1 Q.B. 1.
[21] [1938] 1 K.B. 715.
[22] [1959] 1 Q.B. 1.

SALMON J. I agree with everything that has fallen from my Lord, and there is nothing which I can usefully add.

LORD PARKER C.J. I have come to the same conclusion. In particular, after reading the two material sections in the Shops Act, section 12 and section 58, dealing respectively with what I may call weekday trading and Sunday trading, I can find no material distinction. It seems to me that the test or criterion to be applied in deciding whether a piece of ground is a place where retail trade or business is carried on is the same under both sections. That being so, it follows, I think, that this court is bound by the English decisions to which Donovan J. has referred and, in particular, by the decision of this court in *Stone* v. *Boreham*.[23] Looked at in that way, I can see no distinction between the barrow in the present case and the mobile van in *Stone* v. *Boreham*[23] except to a slight degree. I would, like my Lords, specifically reserve for a future occasion the question whether if a barrow had a fixed location either by practice or by licence it would come within the sections. It seems to me, as at present advised, that the only real difference between the decisions in England and in Scotland turns on the degree of permanency necessary. If one looks at the judgments of Lord Goddard C.J. and Devlin J. in *Stone* v. *Boreham*,[24] I think that becomes quite clear. The English decisions emphasise that it requires more than a casual retail sale to constitute a piece of ground the place where a retail trade or business is carried on, whereas Scotland has gone the length of saying that any place from which a casual sale is carried

[23] [1959] 1 Q.B. 1.

[24] Ibid. 6, 9.

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out is a place within the section. I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *J. G. Barr, Solicitor, London County Council.*

J. F. L.

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26, 27.

Lord Parker
C.J.

MACE *v.* R. & H. GREEN AND SILLEY WEIR LTD. AND ANOTHER.

[1957 M. No. 2108.]

Negligence—Safe system of work—Access to place of work—Work on third party's premises—Hold of ship.
Dock—Regulations—Safe means of access—Hold of ship—Bagged cargo unloaded—Spillage not cleared—Hold "in which work is being "carried on"—Meaning of "work"—Work on the processes—"Loading, unloading"—Meaning of "unloading"—Docks Regulations, 1934 (*S.R. & O.*, 1934, *No.* 279), *reg.* 11 (1).
Shipping—Loading or discharge—Meaning—Bagged cargo unloaded but spillage not cleared.

The plaintiff, a boilermaker employed by ship repairers, was instructed by his chargehand to open the manhole doors in the floor of one of the holds of a ship. The ship was still being unloaded, but the hold in which the plaintiff was required to work had been cleared of a bagged cargo of castor seed the previous day, except for spillage and dunnage which the crew were clearing and stacking at the time the plaintiff went down to do his work. Having completed his work the plaintiff, while ascending a ladder giving access from the hold to the 'tween deck, caught his foot in a rope wound round one of the rungs, slipped and fell, sustaining injury. He sued his employers, alleging negligence, and the shipowners alleging, inter alia, a breach of regulation 11 (1) of the Docks Regulations, 1934,[1] in failing to provide a safe means of access to the place in which the work was being carried on:—

Held, (1) that the rope in the position on the ladder constituted a danger so that the means of access was unsafe, but the employers were entitled to assume, in the absence of notice, that the premises in which their employees were to work were safe and that nothing had been done by those working there to make them unsafe; accordingly, there was no breach by the employers of the duty of care they owed to the plaintiff and his case against them failed.

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[1] Docks Regulations, 1934, reg. 11: "(1) If the depth from the level "of the deck to the bottom of the "hold exceeds five feet, there shall be "maintained safe means of access "from the deck to the hold in which "the work is being carried on."

Principles in *Smith* v. *Austin Lifts Ltd.* [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81 applied.

(2) That the words "in which work is being carried on" in regulation 11 (1) meant "in which work on the processes is being "carried on," the processes being those covered by Part II (which include loading and unloading); and that regulation 11 (1) was a general one so that the duty imposed thereunder on the owner, master or officer in charge of a ship was not confined merely to persons employed in those processes.

Canadian Pacific Steamships Ltd. v. *Bryers* [1958] A.C. 485; [1957] 3 W.L.R. 993; [1957] 3 All E.R. 572 applied.

(3) That the clearing up of spillage was ancillary to and part of the process of unloading or loading and, accordingly, at the time the accident occurred, the Docks Regulations applied. As, on the facts found, there was not a safe means of access from the hold to the lower 'tween deck there had been a breach by the shipowners of regulation 11 (1) and the plaintiff was entitled to succeed against them.

Manchester Ship Canal Co. v. *Director of Public Prosecutions* [1930] 1 K.B. 547; 46 T.L.R. 163 and *Hawkins* v. *Thames Stevedore Co. Ltd.* [1936] 2 All E.R. 472 considered.

ACTION.

The following facts are summarised from the judgment: On Saturday, May 30, 1953, the plaintiff, Henry Edward Mace, an experienced boilermaker employed by the first defendants, R. & H. Green and Silley Weir Ltd., ship repairers, was sent by his chargehand to open up the manhole doors of a tank forming the floor of No. 1 hold of the *S.S. Kenya*, a ship owned by the second defendants, British India Steam Navigation Co. Ltd. The plaintiff was accompanied by his mate, one Edgcumbe. The ship was a modern passenger and cargo vessel of 12,000 tons or more which was doing a turn round in wet dock at the Royal Albert Docks. She had discharged her passengers and was in course of unloading a cargo of castor seed in bags. The cargo had, except for spillage, been discharged from No. 1 hold the previous day, but unloading was proceeding in the other holds and reloading was due to begin the following Monday. On the Saturday afternoon some of the ship's Lascar crew were down in No. 1 hold, where the plaintiff was required to work, sweeping up the spillage and removing it, clearing up the mats and stacking the boards forming the dunnage. Other employees of the first defendants were on various other parts of the ship doing minor repairs and maintenance work during the turn round.

The way down to No. 1 hold was by ladders, first, from the main deck to the first 'tween deck, from the first 'tween deck to the second 'tween deck and from the second 'tween deck to the hold and the tank top. The ladders were sloping, that from the lower 'tween deck to the hold being of slightly unusual construction in that the stringers were made of angle iron and the rungs of thick half-inch mild steel, flat bars, about 10 or 10½ inches wide between the stringers. There were, in addition, vertical ladders, but the sloping ladders were those generally used by the men.

The plaintiff and his mate completed their work on the manhole doors. Edgcumbe went back up the sloping ladder ahead of the plaintiff. The plaintiff, having ascended 15 feet of the ladder from the hold, slipped and fell to the ground sustaining injuries.

In an action for damages for personal injuries which the plaintiff brought against his employers and the shipowners, he alleged that there was a rope wound loosely round a rung of the ladder in which he caught his foot, so causing him to slip and fall. He alleged negligence against his employers, claiming that they had failed in the common law duty owed by a master to his servant to see that the premises were reasonably safe for use, in particular by permitting the rope to be wound round the ladder and in failing to take any or any sufficient steps whether by examination or inspection or by the removal of the rope. He also alleged that the lighting was inadequate.

Against the shipowners, the plaintiff alleged a breach of their statutory obligation under regulation 11 (1) of the Docks Regulations, 1934, to provide safe means of access from the deck to the hold in which work was being carried on. Alternatively, he alleged a breach of the duty owed at common law by invitor to invitee.

Both defendants denied liability. They denied that there was a rope in the position claimed by the plaintiff or any rope. Both alleged contributory negligence on the part of the plaintiff. The shipowners also contended that the Docks Regulations, 1934, did not apply.

Charles Doughty Q.C. and *J. G. K. Sheldon* for the plaintiff.

R. Marven Everett Q.C. and *H. Tudor Evans* for the employers. An employer is under a liability to take reasonable care to ensure the safety of his workpeople, but in circumstances such as the present the employers ought not to be held liable. The circumstances here are similar to those in *Hodgson* v. *British Arc Welding Co.*,[2] where an electric welder employed by ship repairers, who were subcontracting for the electric arc welding in the course of repairs to a ship, fell from scaffolding which had been erected by the main contractors and on which there was a warped and twisted plank which tipped when the plaintiff walked along it. In that case the plaintiff's case against his employers was stronger than in the present case because there there was an obvious defect in the scaffolding which was plain to anyone who chose to go and look at it, yet Hilbery J. held that there had been no breach by the employers of their duty towards the plaintiff, although the main contractors were liable to him for a breach of the Shipbuilding Regulations, 1931. It is submitted that, in the absence of special circumstances, there is no duty on an employer to inspect the premises of a third party in which his workpeople are to work: see *Thomson* v. *Cremin.*[3] Assuming that there was a rope in the position which the plaintiff alleged and that it caused him to slip, any liability therefor rests on the shipowners. The plaintiff's employers sent him and his workmate down into No. 1 hold from which the cargo had been cleared the previous day. It is not the practice of ship repairers, in those circumstances, as reasonably prudent employers, to inspect the hold to see whether the stevedores had wound a rope round the ladder or the ship's crew had left the ladder in a highly dangerous condition.

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[2] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.

The duty of a master towards his servant when working on the premises of a third party is of a limited nature: see *Davie* v. *New Merton Board Mills Ltd.*,[4] *per* Lord Reid,[5] and *Wilson* v. *Tyneside Window Cleaning Co.*[6] The latter case, a unanimous decision of the Court of Appeal, was quoted with approval in *Smith* v. *Austin Lifts Ltd.*[7] In *Smith's* case [7] the employer was found liable to the plaintiff who sustained an accident while working on the premises of a third party, the House of Lords reversing the decision of the Court of Appeal in relation to the employer, but in the House of Lords the question of the liability of an employer in such circumstances was discussed: see *per* Viscount Simonds,[8] Lord Morton of Henryton [9] and Lord Denning.[10] Lord Reid,[11] who dissented on the facts, was clearly following what was said in *Winter* v. *Cardiff Rural District*

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[3] [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103n.

[4] [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.

[5] [1959] 2 W.L.R. 331, 356.

[6] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

[7] [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81.

[8] [1959] 1 W.L.R. 100, 105.

[9] Ibid. 108.

[10] Ibid. 116.

[11] Ibid. 111.

Council [12] and *Wilson* v. *Tyneside Window Cleaning Co.*[13] It is conceded that if the work which the plaintiff was required to do had been of such a nature that it needed to be laid out for him, it would have been the duty of the employers to go and see the premises and, if they saw a rope, to ask the ship's officers to have it removed, but short of that it is submitted that there was no duty on them to inspect the premises.

[LORD PARKER C.J. Why did the Court of Appeal in *Smith* v. *Austin Lifts Ltd.*[14] reverse the decision of Oliver J. against the employer?]

It may be that the decision of the Court of Appeal in that case was given before doubt was cast on *Cilia* v. *H. M. James & Sons* [15] and *Taylor* v. *Sims and Sims.*[16]

On the question of causation, even if there was a breach of duty on the part of the employers, the part it played in causing the accident was so small that it ought to be disregarded.

Montague Berryman Q.C. and *W. G. Wingate* for the shipowners. As to the application of the Docks Regulations, 1934, both on the evidence of the plaintiff's witness, Edgcumbe, and of the second defendants' witnesses, the ship's officers, the discharge of cargo from No. 1 hold had been completed the previous day, the stevedores had departed and all the hatch covers had been replaced and deck openings covered in. It is submitted, therefore, that at the time the accident took place the process of unloading in No. 1 hold had been completed: *Manchester Ship Canal Co.* v. *Director of Public Prosecutions* [17]; *Hawkins* v. *Thames Stevedore Co. Ltd.*[18] In those circumstances at the material time regulation 11 of the Docks Regulations, 1934, did not apply. The fact that at the time when the plaintiff went down to do his work the hatch covers to No. 1 hold had been removed to enable the ship's crew to go down and clear out the hold does not affect the matter. Admittedly regulation 11 would have applied if the process of unloading was still being carried on at the time when the accident took place. Regulation 11, however, comes in Part II of the Docks Regulations, 1934, and is subject to the preamble. It must relate only to the processes specified in the preamble, namely, "loading, unloading, moving and handling "goods . . ." It does not relate to any other processes than those referred to in the preamble. If it did, it would be ultra vires. If the regulation did not apply, the shipowners could not have committed any breach thereof. Nor, it is submitted, was there any breach of duty at common law as occupiers of the ship. Reliance is placed on *London Graving Dock Co.* v. *Horton.*[19]

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[12] [1950] 1 All E.R. 819.

[13] [1958] 2 Q.B. 110.

[14] [1959] 1 W.L.R. 100.

[15] [1954] 1 W.L.R. 721; [1954] 2 All E.R. 9.

[16] (1942) 58 T.L.R. 339; [1942] 2 All E.R. 375.

[17] [1930] 1 K.B. 547; 46 T.L.R. 163.

[18] [1936] 2 All E.R. 472.

Charles Doughty Q.C. and *J. G. K. Sheldon* in reply. As to the liability of the shipowners, it is submitted that at the time when the accident took place regulation 11 of the Docks Regulations, 1934, applied and the shipowners were in breach of their obligations thereunder. At the material time, although the bagged cargo had been removed from No. 1 hold, unloading from that hold had not been completed because members of the ship's crew were still working in the hold clearing the spillage and stacking the dunnage. Moreover, at the material time unloading was still going on in at least three other holds. Until that work had been completed the shipowners were bound by regulation 11. The words of regulation 11 are very wide. It applies to " work " being carried on. The shipowners cannot substitute the word " processes " for the word " work " in the regulation. " Process " is a word of definition which has been used in other regulations: see in particular regulation 12. Had the legislature intended regulation 11 to apply to " processes," that word would have been used. If, as it is submitted, regulation 11 applies, the plaintiff is covered by it. The contrary has not been argued. [Reference was made to *Canadian Pacific Steamships Ltd.* v. *Bryers.*[20]]

As to the case against the employers, the law as to the liability of an employer towards his servant working on the premises of another party is changing rapidly. The high watermark of an employer escaping liability is *Horton's* case,[21] but at the time that case was decided *Taylor* v. *Sims and Sims*[22] was considered to be the law. Moreover, the position in *Horton's* case[23] was very artificial. It is not a case which ought to be extended: see *Smith* v. *Austin Lifts Ltd.*,[24] *per* Lord Denning.[25] *Hodgson's* case,[26] which is relied on by the employers, though approved, is now bad law.

[LORD PARKER C.J. *Hodgson's* case[26] is good law. *Taylor* v. *Sims and Sims*[27] is now bad law.]

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[19] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[20] [1958] A.C. 485; [1957] 3 W.L.R. 993; [1957] 3 All E.R. 572.

[21] [1951] A.C. 737.

[22] 58 T.L.R. 339.

[23] [1951] A.C. 737.

[24] [1959] 1 W.L.R. 100.

[25] Ibid. 116.

[26] [1946] K.B. 302.

[27] 58 T.L.R. 339.

Hodgson's case[28] turned upon special facts and a particular type of scaffolding. An employer owes a general duty of care towards his servant even when he is working on the premises of a third party. The extent of that duty is a question of degree which depends on the facts in each case. It is not disputed that if the premises on which the plaintiff was working had been his employers' own premises they would have been liable. They had a duty to inspect the premises if they could reasonably anticipate danger. That applies whether the workman is working on the premises of his own employer or on somebody else's premises. [Reference was made to *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[29]] In this case the employers, having failed to inspect the premises, were in breach of their duty towards the plaintiff and the plaintiff is entitled to succeed against them.

LORD PARKER C.J. This matter arises nearly six years after the event. I am not saying that anybody is particularly to blame, but it makes the task of witnesses and of the court extremely difficult. Memories, anyhow, are liable to fail and after six years they are almost bound to fail. Moreover, one is bound to be suspicious of a plaintiff's claim in those circumstances; one approaches the matter on the basis that it may be something that he has gradually in the course of time conjured up, and one is bound to look at his evidence with great suspicion. Again, from the point of view of the court, it is often impossible in these circumstances to accept the whole of the evidence of any one witness, however honest he is and however much he may be trying to tell the truth. Six years after the event witnesses may with the best will in the world be at fault. [His Lordship stated the facts, reviewed the evidence and made the following findings of fact: (1) that there was a rope wound round a rung of the ladder in about the position in which the plaintiff had alleged it to be; (2) that it was the rope that had caused him to slip; (3) that the rope in the position his Lordship had found it to be was a danger and that it prevented the ladder from being a safe means of access; (4) that the lighting was adequate. His Lordship continued:]

I will consider first the respective cases against the defendants. The first defendants, the employers, say, quite shortly, that the lower hold was not in their control: it was in the control of the shipowners; the shipowners were the occupiers. True, the duty on the employers to take reasonable care remains, but in all the circumstances reasonable care did not, they claim, call for an inspection by them, the first defendants, of this ladder. At one time it was often thought that where a master sent his servant to work on somebody else's premises he owed no duty to the servant in regard to those premises. I think that that was a misunderstanding as to the true position and that, as has been indicated by the Court of Appeal in *Davie* v. *New Merton Board Mills Ltd.*[1] and in *Wilson* v. *Tyneside Window Cleaning Co.*,[2] a duty to take reasonable care is always there but the performance of it will vary according to all the circumstances, including the question whether the premises are in the occupation and control of another person. I should add that, if my reading of *Smith* v. *Austin Lifts Ltd.*[3] is right, what was said in *Wilson* v. *Tyneside Window Cleaning Co.*[4] has, in effect, been approved in the House of Lords. That being so, I have to ask myself as a jury, whether reasonable care in these circumstances demanded some inspection by the first defendants. I think it is clear that if the cause of the fall had been some defect in the ladder itself it could not be suggested that the first defendants were at fault in not seeing that the ladder was structurally sound. They would have no reason to suspect that it was not. The ship was a modern ship. The second defendants were well known and reputable shipowners and there would be nothing to suggest that a reasonable employer ought to go and inspect the ladder. Nor do I think that this was a case where the nature of the work demanded an inspection and a laying out, as it were, for the safety of the workmen. For these experienced men, who, I have no doubt, had done the same sort of job hundreds of times, nothing more was required than that they should be told to go and do it. It seems to me that the only way it can be put by the plaintiff here is to say that there were a lot of men working there; the stevedores had just finished unloading the bags, some of the ship's crew were there cleaning up; there were potential dangers all the time; and in those circumstances either the foreman boiler maker, or the chargehand should have gone down with the men to see that everything was all right for them to work. It is said that it would have been easy for them to have done so, but it seems to me that this is a jury question and, sitting as a jury and considering the matter as best I can, I cannot think that reasonable care demanded any such course of action. In these circumstances I think that ship repairers on a ship doing a hundred and one jobs during the course of the turn round of the ship must be entitled to assume, in the absence of notice of some kind—and when I say "in the absence of notice of some kind," I am thinking, in particular, of *Smith* v. *Austin Lifts Ltd.*[5]—that the premises where the men are going to be sent to work are safe and that those who have been and are working there have not done anything to make them unsafe. I feel constrained to hold that there has been no breach by the first defendants of the duty of reasonable care.

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[28] [1946] K.B. 302.

[29] [1956] 1 W.L.R. 177; [1956] 1 All E.R. 385.

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[1] [1958] 1 Q.B. 210; [1958] 2 W.L.R. 21; [1958] 1 All E.R. 67; affd. H.L. [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.

[2] [1958] 2 Q.B. 110; [1958] 2 W.L.R. 900; [1958] 2 All E.R. 265.

[3] [1959] 1 W.L.R. 100; [1959] 1 All E.R. 81.

[4] [1958] 2 Q.B. 110.

I now come to the case against the second defendants. I will deal first with regulation 11 (1) of the Docks Regulations, 1934. That regulation is made pursuant to powers contained in the Factory and Workshops Act, 1901, in respect of certain processes, the processes being of "loading, unloading, moving and handling "goods in, on, or at any dock, wharf, or quay, and the processes "of loading, unloading and coaling any ship in any dock, harbour, "or canal," and it is directed "that they shall apply to all "docks, wharves, quays and ships as aforesaid." The duty under regulation 11 (which is in Part II) is a duty of the owner, master, or officer in charge of the ship. Accordingly, the regulations deal with and are under the umbrella of these particular processes. That is the first thing to observe. The second thing to observe is that regulation 11 does not apply, as many of the regulations do, merely to persons employed, namely, persons employed in the processes. It is perfectly general, and, following the recent House of Lords decision in *Canadian Pacific Steamships Ltd.* v. *Bryers*,[6] the plaintiff qualifies, if one may put it that way, for protection under regulation 11. But the real question is whether regulation 11 (1) applies at all in the circumstances of this case where, although unloading was being done in other parts of the ship, the actual unloading of the bags and cargo had been completed in No. 1 hold on the previous Friday evening and the hatch covers on the main deck had been put on.

Mr. Berryman, for the shipowners, relies very strongly on the last few words of regulation 11 (1), namely: "in which work "is being carried on." He argues that those words must mean

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[5] [1959] 1 W.L.R. 100.

[6] [1958] A.C. 485; [1957] 3 W.L.R. 993; [1957] 3 All E.R. 572.

"in which work on the processes is being carried on." Mr. Doughty for the plaintiff, on the other hand, contends that although the whole of this comes under the umbrella of "processes," yet so long as the ship, looked at as a whole, is still being unloaded it matters not that the actual work in the hold in question is not of the character of unloading. He points to other regulations such as regulation 12, where, when the reference is to processes, it says so—"When the *processes* are being carried "on"—and he contrasts that with the expression "in which "work is being carried on." In regulation 11 (1) I confess that it seems to me that as a matter of construction the words "in "which work is being carried on" must mean work on the processes, and I accept Mr. Berryman's contention on that point.

But the matter does not end there, because Mr. Doughty goes on to contend that even if that is so there was work still going on in this hold which was at any rate connected with the processes and ancillary to them. He argues that, true, the bagged cargo had been unloaded, but it is wrong to speak of the unloading having been completed when there are still "goods" in the hold, namely, spillage which has to be swept up and which has to be taken up to the decks above and disposed of. He submits that the process of unloading, and, he would add, of handling goods, has not been completed until the spillage has been cleared up and, he would add, the dunnage also.

There appears to be no authority on this point. Reference has been made to two cases, namely, *Manchester Ship Canal Co.* v. *Director of Public Prosecutions* [7] and *Hawkins* v. *Thames Stevedore Co. Ltd.*[8] I need not refer to those cases. It is enough to say that it was held in the one case that the closing of the hatch covers, at any rate on the main deck, was part of the process of unloading, and, in the other case, of loading, albeit ancillary to it; and, as it was put in those cases, the process of unloading or loading, as the case may be, is not completed until the hatch covers are put on. I do not read those cases as saying that if the hatch covers are put on that is of itself conclusive evidence that the unloading or the loading has been completed. I treat them as authority for the fact that the process of unloading is something which one may look upon as a wide description of a process involving matters that have to be judged in connection therewith and ancillary thereto, such as closing hatch covers, and, if I am right in approaching it in that way, then it seems to me that the clearing up of the spillage—and I need not go further than that and deal with dunnage—is ancillary to the process of unloading, and, if not ancillary to the process of unloading, it would be ancillary to the process of loading. It is certainly something which has to be done in connection with the unloading and the loading, and I think it would be wrong to say that the moment the bagged or cased cargo has been removed the process has ended and that thereupon there is an interval during which some other process is carried on, namely, sweeping up and preparing. It seems to me that the sweeping up of the spillage is really to be looked at as ancillary to and part of the process of unloading. Accordingly, in my judgment, at the time when this accident occurred, the Dock Regulations applied and on the findings that I have already made there was not then a safe means of access from the lower hold to the lower 'tween deck.

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[7] [1930] 1 K.B. 547; 46 T.L.R. 163.

[8] [1936] 2 All E.R. 472.

[His Lordship then said that on the view he had taken of regulation 11 (1) it was unnecessary for him to deal with the plaintiff's alternative allegation against the second defendants based on the duty of invitor to invitee, but he would shortly state his views on it. The case fell to be decided under the law prior to the Occupiers' Liability Act, 1957, in other words, under the law enunciated in *London Graving Dock Co.* v. *Horton.*[9] As there was here an unusual danger, the sole question was whether the plaintiff had a full appreciation of it. On the evidence, he thought that the real probabilities were that the plaintiff saw the rope and thought it would cause no trouble; but whatever the true position, he was not satisfied that the plaintiff had a full appreciation of the danger in the way that the matter was dealt with by Lord Denning in *Smith* v. *Austin Lifts Ltd.*,[10] and if he were wrong in holding the second defendants liable under the Dock Regulations he would say that they were under a liability as invitor.

His Lordship then dealt with the allegation of contributory negligence made against the plaintiff. He held the plaintiff guilty of contributory negligence and awarded liability in the proportion of two-thirds to the second defendants and one-third to the plaintiff. Special damages being agreed at £3,330, his Lordship assessed general damages at £6,000 and accordingly awarded the plaintiff £6,220 against the second defendants.]

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[9] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[10] [1959] 1 W.L.R. 100, 116.

Judgment for first defendant against the plaintiff with costs. Judgment for the plaintiff against second defendants with costs. Order that the first defendant's costs be added by the plaintiff to their costs against the second defendants.

Solicitors: *Shaen, Roscoe & Co.; Barlow, Lyde & Gilbert; Botterell & Roche.*

E. M. W.

M. & J. S. PROPERTIES LTD. *v.* WHITE.

[Plaint No. O. 3120.]

C. A.

1959
March 17, 18.

Hodson,
Sellers and
Willmer L.JJ.

Landlord and Tenant — Rent restriction — Release from control — "Premises"—Meaning—Whether right to use garden in common with other tenants constitutes "premises comprised in one of the "tenancies"—Whether tenant moving from controlled ground floor tenancy with use of garden to first floor tenancy with use of garden on new letting after date of coming into force of decontrolling Act protected—Rent Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11 (2), *proviso.*

A tenant of a ground floor flat controlled under the Rent Restriction Acts, 1920–39, enjoyed the right to use the garden of the house in common with the tenant of the first floor flat. On July 13, 1957, seven days after the coming into force of the Rent Act, 1957,[1] the first floor flat became vacant, and the ground floor tenant took over the first floor tenancy by a verbal agreement with the landlords' predecessors at 25s. a week, using the garden in the same manner as the previous first floor tenant.

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[1] Rent Act, 1957, s. 11 (2): "The "Rent Acts shall not apply to a "tenancy created by a lease or agree- "ment coming into operation at or "after the commencement of this Act, "and the tenant shall not by virtue "of those Acts be entitled to retain "possession as a statutory tenant on "the coming to an end of such a "tenancy: Provided that this sub- "section shall not apply where the "person to whom the tenancy is "granted was immediately before the "granting the tenant under a con- "trolled tenancy and the premises "comprised in one of the tenancies "are the same as, or consist of or "include part of, the premises com- "prised in the other."

On January 23, 1958, the landlords served on her notice to quit expiring on February 22, 1958. Later they asked for an order for possession, claiming that as the new tenancy had been created by an agreement coming into operation after the commencement of the Act of 1957 (July 6, 1957), the tenancy had become decontrolled and that, accordingly, they were entitled to possession. The tenant by her defence claimed that she had immediately before July 6, 1957, been a tenant under a controlled tenancy of the ground floor, comprising, inter alia, the use of the garden, and that, as the premises comprised in the new tenancy also included the use of the garden, she was within the protection afforded by the proviso to section 11 (2) of the Act of 1957:—

Held, that the word "premises" in the proviso to section 11 (2) was directed to premises capable of physical occupation and not to an incorporeal right, such as the use in common with other tenants of a garden, which might be added to the tenancy; accordingly, the new tenancy was outside the protection of the Rent Restriction Acts and the landlords were entitled to possession.

Dicta in *Gardiner* v. *Sevenoaks Rural District Council* (1950) 66 T.L.R. (Pt. 1) 1091, 1092; [1950] 2 All E.R. 84, and *Whitley* v. *Stumbles* [1930] A.C. 544, 546; 46 T.L.R. 555 considered.

Appeal from Judge Malcolm Wright, sitting at Willesden County Court.

The landlords of a house consisting of two floors at 308, Chapter Road, N.W.2, claimed possession of the first floor rooms and mesne profits from the tenant, Mary Louise White. By their particulars of claim they stated that the rooms were let to her by their predecessors in title on or about July 13, 1957, on a weekly verbal tenancy at an inclusive rent of 25s. per week; that the tenancy had been duly determined by notice to quit served on January 23, 1958, expiring on February 22, 1958; that the tenancy was one to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, did not apply by virtue of section 11 (2) of the Rent Act, 1957; and, accordingly, that they were entitled to possession of the rooms.

By her defence the tenant said that she would rely on the Rent Act, 1957,[1] and would contend that immediately before July 6, 1957 [the date on which the Rent Act of 1957 came into force] she had been the tenant under a controlled tenancy of the ground floor rooms at 308, Chapter Road, comprising, inter alia, the use of the garden at that address, and that the premises comprised in the tenancy of the first floor rooms let to her by the landlords' predecessors in title about July 13, 1957, also comprised the use of the garden.

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[1] See note on p. 25.

At the hearing in the county court, evidence was given which showed that the tenant had as tenant of the ground floor rooms been entitled to use the garden in common with the then tenant of the upstairs rooms. By agreement between the tenants, each cultivated one side of the garden, and they shared the use of the grass in the middle. The tenant of the ground floor also had the use of a water closet in the garden while the upper floor tenant had a water closet in the house itself.

The county court judge in his judgment on November 11, 1958, said that the question for decision turned on what view was to be taken of the fact that under the tenant's ground floor tenancy, which was a controlled tenancy, she had the use of the garden, and that under the tenancy of the first floor she still had the use of the garden. The question was whether it was to be said that by virtue of the fact that under each tenancy she had the right to use the garden the premises comprised in one of the tenancies included part of the premises comprised in the other, such as to bring her within the proviso to section 11 (2) of the Act of 1957.[1] One had to decide the question by looking at the words used in the statute and taking them in their natural and ordinary meaning. What were the "premises" comprised in the other letting? They were the first floor flat with the right to use the garden. It did not seem to him to matter what in law was the precise nature of the right to use the garden, since the premises in each case comprised a use of the garden. A letting only granted a right to use the property let by way of enjoying exclusive possession of it. The fact that the garden must be shared with somebody else did not prevent it from being part of the premises comprised in the tenancy; and if that were right the tenant was protected.

The judge said that he disagreed with the decision of Judge Alun Pugh on March 17, 1958, in *Parperis* v. *Panteli*,[2] in which it had been held that where a tenant who enjoyed a house with a shared water closet moved to other premises in the same building sharing the same water closet, the "other premises" did not comprise part of the premises the tenant used to occupy.

The judge held, accordingly, that the tenant was protected under the Rent Restriction Acts in her tenancy of the first floor, and dismissed the claim for possession.

The landlords appealed.

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[1] See note on p. 25.

[2] (1958) 108 L.J. 476.

S. W. Magnus for the landlords. First, the right to use the garden in common with the other tenant of the same house does not constitute "premises comprised in the tenancy," within the proviso to section 11 (2) of the Act of 1957. It is conceded that if the tenant here had the exclusive use of the garden the proviso would apply; but this right in common over the same piece of land is no more than a licence and cannot be a lease, even of an incorporeal hereditament, since it is not under seal. The decision of Judge Alun Pugh in *Parperis* v. *Panteli*[3] that the right to share a water closet was no more than a licence, and did not constitute "premises" within the protection of the proviso, should be preferred to that of the county court judge in the present case.

The word "premises" is not defined in the Act of 1957, and judicial consideration of the word in *Gardiner* v. *Sevenoaks Rural District Council*, *per* Lord Goddard C.J.,[4] and in *Whitley* v. *Stumbles*, *per* Viscount Hailsham,[5] is only slightly relevant to the present question; but presumably the word "premises" is used in this Act in its developed sense as attaching to real property or a right in property, and not in its old sense of "that "which went before."

The mischief at which the proviso to section 11 (2) is aimed is the possibility of a landlord taking premises outside the protection of the Rent Acts by inveigling a tenant into taking an additional room or giving up a room after the coming into force of the Act of 1957, and then calling it a new letting of different premises which would be outside the statutory protection. That is not the position here.

Secondly, if the right to use the garden could conceivably fall within the meaning of "premises," it is submitted that the right which this particular tenant enjoyed with the first floor tenancy was not the same right which she enjoyed when she was the tenant of the downstairs flat. The tenant said in evidence that she had considered that she was stepping into the shoes of the upstairs tenant in her use of the garden, so that she herself regarded it, not as the retention of an existing right, but as the taking over of a right enjoyed with the upstairs flat.

The county court judge erred in law in saying that the "premises" were the first floor flat with the right to use the garden, for that begs the question which he had to decide.

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[3] 108 L.J. 476.

[4] [1950] W.N. 260; 66 T.L.R. (Pt. 1) 1091, 1092; [1950] 2 All E.R. 84.

[5] [1930] A.C. 544, 546–547; 46 T.L.R. 555.

"Letting" implies exclusive possession, and the one thing which is certain is that there was no exclusive possession of the garden by this tenant.

Edward Grayson for the tenant. The Act of 1957 is intended to protect tenants, and the proviso should be construed in the light of that intention and in the context of the Rent Act legislation generally.

[SELLERS L.J. This was not a protecting Act but a releasing Act.]

[WILLMER L.J. It was a releasing Act with safeguards.]

The county court judge was right in saying that it did not matter what in law was the precise nature of the right to use the garden. This was a tenancy together with a right to use the garden, and if this case had reached its conclusion and the judge had had to consider whether or not suitable alternative accommodation had been offered to the tenant, the decisions of the Court of Appeal in *Warren* v. *Austen*[6] and *De Markozoff* v. *Craig*[7]—that reasonable alternative accommodation was not good enough without a garden—support the submission that the use of a garden is a matter to be taken into consideration.

[HODSON L.J. Those cases only say that a garden is a good thing.]

[WILLMER L.J. The gardens there belonged to the premises. A more relevant example would be a garden in a London square reserved for the use of the tenants living in the square. What do you say would be the position if a tenant in such a square changed flats, retaining the right to use the garden?]

The position would be different, for it is unlikely that tenants of flats round a London square would hold tenancies controlled by the Rent Acts. It is conceded that from the narrow conveyancing angle the precedent on drafting a lease with a right to use the garden in Key and Elphinstone (15th ed., vol. 1, p. 998) is against the present submission on "premises," since that right comes under the parcels and is expressed to be something other than the premises. But in the context of rent restriction legislation the word is used in its colloquial sense: compare Viscount Hailsham in *Whitley* v. *Stumbles*[8] that the word "premises" was used in the Landlord and Tenant Act, 1927, to include more than the actual buildings in which a trade was carried on, and extended to incorporeal hereditaments.

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[6] [1947] 2 All E.R. 185.

[7] (1949) 93 S.J. 693.

[8] [1930] A.C. 544, 547.

[Willmer L.J. If you are right, where is the line to be drawn? Would you say that a television aerial was within the meaning of "premises" in this proviso?]

The line should be drawn at the kind of property, such as the right to use a garden, which a landlord would regard as the subject-matter on a sale of the property. The right to use a garden is a very special and particular right, and is precisely the type of right with which the proviso was concerned. There are degrees of such rights to enjoyment; and the fact that if the protection were extended to rights such as the right to use corridors or doors of access or a telephone it might render the decontrolling section 11 (2) nugatory, should not deter this court from upholding the county court judge's decision in the present case. These premises were controlled before the Act of 1957. The tenant moving upstairs seven days after it came into force says that she has a community with her previous tenancy which entitles her to rely on the proviso in respect of the garden as part of the premises comprised in her former tenancy.

Magnus replied.

Hodson L.J. stated the facts set out above, read section 11 (2) and the proviso to it, and continued: The question which arises for decision is whether, on the true construction of this Act, the word "premises" is apt to include this right to use the garden.

It is to be observed that the right to use the garden is not part of the tenant's holding in the ordinary sense of the word. It is not even an exclusive right to the garden. It is a right to use the garden in common with the tenant of the other part of the building.

In interpreting the word "premises," I think one has to look at this Act and the setting in which it appears. This Act is called the Rent Act, 1957, and it is part of a series of Acts which have been passed to protect tenants and their tenancies. This is a decontrolling Act, and it gives a measure of relief to landlords. It is easy, I think, to see the mischief against which the proviso was intended to provide. Those familiar with the working of these Acts know that a landlord has, in the past, been able to change the identity of the subject-matter of a letting so as to obtain a new standard rent—in most cases a higher standard rent—for premises which are very little different from the old controlled premises; and the mischief aimed at by this proviso is no doubt that of a landlord who might persuade a tenant to enter into an agreement for tenancy of substantially the same premises as the tenant had occupied before, or perhaps of slightly different premises (smaller in that some part had been taken away, or larger in that some part had been added). It seems to me quite plain that it is on the face of it directed to premises which are capable of physical occupation, and is not directed to an incorporeal right or easement which may be added to the tenancy.

I think that, in construing the word, one can have in mind the history of the word "premises" which was referred to by Lord Goddard C.J. in *Gardiner* v. *Sevenoaks Rural District Council*,[1] where he pointed out that the word "premises" had originally been no more than a reference to what had gone before, but that, in the language of conveyancers who were dealing with parcels of property, the word "premises" came to mean "land or what stands upon land." That, in the language of conveyancers, is what is usually meant by "premises," and is, I think, illustrated by a precedent in Key and Elphinstone (15th ed., p. 998) where a garden—and a garden is what we are considering here—was referred to separately from "the premises "hereby demised." The same point was made by the House of Lords in *Whitley* v. *Stumbles*,[2] where the only speech was that of Viscount Hailsham. Viscount Hailsham there was considering an incorporeal right—the right of fishing—and the question was whether, "where an incorporeal right, such as a "right of fishing, is demised along with corporeal hereditaments "by the same lease, and the lessee uses both for the purpose "of his trade or business, the incorporeal right is part of the "'premises' within section 5 of the Landlord and Tenant Act, "1927." The House was considering section 17 of the Landlord and Tenant Act, 1927, which contained this definition: "The "holdings to which this Part of this Act applies are any premises "held under a lease, other than a mining lease, made whether "before or after the commencement of this Act, and used wholly "or partly for carrying on thereat any trade or business, and "not being agricultural holdings within the meaning of the Agri"cultural Holdings Act, 1923." Viscount Hailsham discussed the meaning of the word "premises," pointing out that it was conceded that[3] "in strict conveyancing language, the word

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[1] [1950] W.N. 260; 66 T.L.R. (Pt. 1) 1091, 1092; [1950] 2 All E.R. 84.

[2] [1930] A.C. 544; 46 T.L.R. 555.

[3] [1930] A.C. 544, 546, 547.

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"'premises' is used as meaning the subject-matter of the habendum in a lease." But it was also pointed out that it must include, or must be capable of including, things like easements, and, in the particular case under consideration, a wide construction was given to the word "premises" to cover the fishing rights in question there. Viscount Hailsham said[3]: "Any other "construction would, it seems to me, defeat the plain purpose "of the Act, which obviously was to provide that in the circumstances defined in the Act the tenant should have a right to "continue to carry on his trade or business in the premises in "the legal sense in which he was carrying them on under the "lease for which he seeks that renewal."

I think one gains assistance here from considering the purpose, not only of this particular Act, but of the whole of the Rent Acts, which is to protect tenants in their physical occupation of premises rather than to protect such subsidiary rights as may be attached to those premises.

It appears to me that in this case the position really was that the tenant of the ground floor flat and the tenant of the first floor flat had and have a right to use the garden which is in the nature of a licence. I respectfully agree with what was said in another case in the county court, *Parperis* v. *Panteli*,[4] decided under this Act where a new tenancy began in August 1957, that is to say, after the date of the coming into operation of the Rent Act, 1957. There the tenant had the right to share a water closet in the same way as, in this case, the tenant has the right to use the garden. The judge was of opinion—and I agree with him—that the situation was that the use of the water closet was no more than a licence, and that the proviso did not apply. For myself, I think that to hold otherwise would or might lead to very absurd results, because, in cases where a building, even a relatively small building, is split up into parts which are commonly called flats—though I suppose where they are not self-contained they are not strictly flats—it is a common enough thing for the occupants of the different parts of the building to have rights of access, rights of communication between various parts of the building, rights to deposit dust-bins, rights to use telephones, and matters of that kind, which are, on the face of it, not to be supposed to be the subject-matter of this proviso. I, for my part, would on that ground allow this appeal.

A second point was taken by the landlords. It was said that, once the tenant had moved upstairs into the first floor flat, the right to use the garden was not the same right as she had when she was occupying the place below. That seems to me a point which is rather over-subtle, and should perhaps for that reason alone be rejected. I think that substantially it is the same right—the right to use the garden—although it is true that it attaches to different premises when the tenant moves upstairs.

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[4] (1958) 108 L.J. 476.

However, I rest my judgment on the first ground advanced by Mr. Magnus, on which he mainly relies, and say that the proviso does not apply because the right to use the garden is not "part of the premises" on the true construction of this Act of Parliament.

Sellers L.J. I agree with my Lord's interpretation of the proviso and the application of it to the facts of this case. The question which arises is whether the premises which the tenant now occupies include part of the premises which she previously occupied. The only evidence adduced to establish that is that when she entered into her tenancy of the previous premises—the ground floor flat—she was granted the right to use the garden. A similar right was given apparently to one Lincoln, who occupied the upstairs premises which the tenant has now taken. Nothing more is said about it in substance, I think, than that that was a right given to her. What was its precise extent or legal nature was not really investigated and perhaps has to be derived from those simple facts. What in fact took place was that the two tenants agreed to cultivate one one part and one another part of the garden, and there seems to have been a grass plot in the middle which they could, if they wished, share in common.

My Lord has given an interpretation of the section with which I agree. It is on that slender evidence that the tenant seeks to make some link of continuity or overlapping between the two premises occupied by her. I think it is quite inadequate to establish that on any reasonable interpretation of this proviso.

My Lord has referred to the other argument which was advanced, which may be highly technical and not very acceptable. But in fact the tenant in the present occupation of the upstairs flat is enjoying no more and no less than the previous occupier of the flat, that is, she is there occupying the same physical premises and enjoying precisely the same right, and in no way has she, in any real sense, continued anything which was part of her previous tenancy. I prefer the judgment of Judge Alun Pugh in the somewhat similar case cited to us. I agree that this appeal should be allowed.

WILLMER L.J. I also agree that this appeal must be allowed, and I venture to add a few words of my own only because we are differing from the judge below.

The judge held that, when the tenant moved upstairs from the ground floor to the first floor, her retention of the right to use the garden was sufficient to bring her within the proviso to section 11 (2) of the Rent Act, 1957. If such an incorporeal right as the right to use the garden in common with the other tenant in this case is to be held to be included in the word "premises" for the purpose of the proviso to this section, I find it difficult to see, in relation to other incorporeal rights which normally go with the occupation of flats such as these, where one is to stop. My Lord [Hodson L.J.] has already drawn attention to other rights that normally go with the occupation of a flat, such as the right to use the passages and entrances and so forth. Are all such incorporeal rights to be included in the word "premises" for the purposes of this section? If so, I venture to think that there will be few cases where a tenant moving from one flat to another flat in the same building will not be able to invoke some incorporeal right which will bring him or her within the proviso. It is in those circumstances that it seems to me that, in order to make sense of the proviso, one must construe the word "premises" in its physical sense, that is to say, as referring to physical premises which are capable of physical occupation. It is perfectly true, as was pointed out by Lord Goddard C.J. in *Gardiner* v. *Sevenoaks Rural District Council*[5] and by Viscount Hailsham in *Whitley* v. *Stumbles*,[6] that "premises" is a word which is wide enough to include not only corporeal hereditaments but also any incorporeal right which is the subject-matter of the habendum in a lease. But it is, I think, important to observe that Viscount Hailsham himself,[7] in the course of his speech to the House of Lords in the latter case, was at pains to draw attention to the fact that, in the very Act which he was then construing, namely, the Landlord and Tenant Act, 1927, the word "premises" was used in different senses in different contexts. For instance, he referred to instances where the Act referred to the "premises" being demolished—a clear use of the word in its

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[5] 66 T.L.R. (Pt. 1) 1091, 1092.

[6] [1930] A.C. 544, 546–547.

[7] Ibid.

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physical or colloquial sense. Having Viscount Hailsham's weighty authority for the proposition that "premises" is an ambiguous word which may be used in alternative senses, it seems to me to be perfectly open to us to say that "premises" in the present context must have been intended by Parliament to be understood in its popular or physical sense. Unless this is so, I find it difficult to make sense of the proviso. For these reasons, I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *A. A. Seller & Co.; Scott, Winter & Co.*

M. M. H.

REGINA *v.* SMITH.

C.-M. A. C.
1959
March 25.
Lord Parker C.J., Streatfeild and Hinchcliffe JJ.

Criminal Law—Evidence—Confession—Inducement—Inadmissible confession by private soldier to sergeant-major—Subsequent confession after caution—Whether original inducement spent.
Criminal Law—Homicide—Causation—Incorrect treatment before death —Whether break in chain of causation.
Causation.

The appellant, a private soldier, was charged with the murder by stabbing of a soldier of another regiment during a barrack-room fight. Immediately after the fight the appellant's regimental sergeant-major put his company on parade and indicated that the men would be kept there until he learnt who had been involved in the fighting. At the trial the judge-advocate admitted in evidence a statement made by the appellant to the sergeant-major at that parade, confessing to the stabbing. Evidence was also given of a subsequent confession made the following day to a sergeant of the Special Investigation Branch after a caution had been administered. The deceased man had received two bayonet wounds, one of which pierced the lung and caused haemorrhage. While being carried to the medical reception station for treatment he was dropped twice. At the reception station he was given treatment which was subsequently shown to have been incorrect.

The appellant was convicted and appealed on the grounds, inter alia, that the alleged confessions were wrongly admitted in evidence and that the court was not properly directed as to causation:—

Held, (1) that the confession obtained by the regimental sergeant-major was tainted by threat or inducement and was inadmissible.

(2) That if the threat or promise under which the first statement was made still persisted when the second statement was made, then that statement also was inadmissible; only if the time-limit between the two statements, the circumstances existing at the time

and the caution were such that it could be said that the original threat or inducement had been dissipated could the second statement be admitted as a voluntary statement; in the present case the effect of the original inducement was spent and the second statement was admissible.

Dicta of Taunton J. in *Rex* v. *Meynell* (1834) 2 Lew.C.C. 122, 123; Patteson J. in *Reg.* v. *Sherrington* (1838) 2 Lew.C.C. 123, 124; Whiteside C.J. in *Reg.* v. *Doherty* (1874) 13 Cox C.C. 23, 24; Denman J. in *Reg.* v. *Rosa Rue* (1876) 13 Cox C.C. 209, 210 applied.

(3) That, as at the time of death the original wound was still an operating and a substantial cause, death could properly be said to be the result of the wound, albeit that some other cause also operated.

Dictum of Lord Wright in *The Oropesa* [1943] P. 32, 39; [1943] 1 All E.R. 211; *Minister of Pensions* v. *Chennell* [1947] K.B. 250; [1946] 2 All E.R. 719 applied.

Reg. v. *Jordan* (1956) 40 Cr.App.R. 152 distinguished.

Appeal against conviction.

The appellant, Thomas Joseph Smith, a private soldier in the King's Regiment, took part in a fight between a company of his regiment and a company of the Gloucestershire Regiment, who were sharing barracks in Germany, on the night of April 13, 1958. Three men of the Gloucesters received stab wounds. One of them subsequently died.

Immediately after the fight a regimental sergeant-major of the King's Regiment put his company on parade and indicated that it was his intention to keep them there until he learnt who had been involved in the fighting. Nobody stepped forward, and he then addressed each man personally. He was told by the appellant that he had been in bed at the relevant time. The sergeant-major then said, in effect, that he would not leave until he got an answer, and the appellant stepped forward and confessed to the stabbing, which he said he had done with a bayonet which was by a bed in the barrack-room. The next day a sergeant from the Special Investigation Branch, having cautioned the appellant, referred to his earlier confession, and the appellant then made a statement admitting the stabbing.

The appellant was convicted of murder at a general court-martial and was sentenced to imprisonment for life. He appealed on the ground that the confessions were wrongly admitted in evidence.

Roderic Bowen Q.C. and *H. K. Woolf* for the appellant. On the question of the admissibility of evidence relating to the first confession, the position of a soldier on parade is analogous to that of a man in custody; he is not entitled to leave the parade. The relationship of the individuals concerned is also relevant: in this case one was a regimental sergeant-major and the other was a young soldier in his regiment. In all the circumstances it was wrong of the judge-advocate to rule that the admission made at the parade was a voluntary admission and that evidence relating to it was admissible. [Counsel was stopped on this point.]

On the assumption that the first admission was inadmissible, the whole proceedings were tainted by reason of what the regimental sergeant-major said at the parade. No objection was made at the trial in relation to the second admission, because the judge-advocate ruled that the first confession was admissible, but at the outset of the interview during which the second admission was made, the sergeant of the Special Investigation Branch faced the accused with the admission he had made to his regimental sergeant-major. The object of a caution is to place a man in the position of knowing that he is not obliged to say anything. In this case the court has to be satisfied that the effect of the threat made by the regimental sergeant-major had been dissipated before the second admission was made, and that the fear which brought about the first admission no longer persisted in any way: *Rex* v. *Meynell*[1]; *Reg.* v. *Sherrington*[2]; *Rex* v. *Knight and Thayre*[3]; *Reg.* v. *Doherty*[4]; *Reg.* v. *Rosa Rue.*[5] It is impossible to say that once the parade was dismissed and the man was put in custody the inducement or threat had gone. The continuing inducement was that the accused had been ordered to confess by his regimental sergeant-major, who was in authority over him, and that order remained.

On the question of causation, the court must be satisfied that the treatment subsequent to the wounding was normal. In this case there was abnormal treatment. Causation is a question of fact, and whether there has been a break in the chain of causation is a matter for the court. The issue should have been put to the court by the judge-advocate on the basis of *Reg.* v. *Jordan.*[6] The court must be satisfied that the death was a natural consequence and was the sole consequence of the wound and flowed directly from it. First it must be considered whether immediately after the wounding the deceased man might have survived, and if his chances of survival were removed by the treatment he was given, death did not result from the wound. The function of the judge-advocate in a case of this kind is to give a careful summing-up, pointing out that the court must be satisfied that there was no break in the chain of causation, giving some guidance on what constitutes a break, and then indicating the evidence on which this issue should be determined; in this case the judge-advocate should have said in effect that after the wound had been sustained there was a possibility that the haemorrhage would stop, and he should have posed the question whether that possibility was removed by what amounted to abnormal treatment. The directions of the judge-advocate were inadequate on this point. [Counsel referred to *Reg.* v. *Ledger*[7] and *Thabo Meli* v. *The Queen.*[8]]

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[1] (1834) 2 Lew.C.C. 122.

[2] (1838) 2 Lew.C.C. 123.

[3] (1905) 21 T.L.R. 310; 20 Cox C.C. 711.

[4] (1874) 13 Cox C.C. 23.

[5] (1876) 13 Cox C.C. 209.

[6] (1956) 40 Cr.App.R. 152.

E. Garth Moore for the Crown. On the question of evidence relating to the first admission, if this was inadmissible it was so presumably because the accused was enforced by a threat. The observations of the regimental sergeant-major were not directed to the accused alone, but to a whole company and were mixed up to a great extent with exhortation. The sanction for not answering (merely to keep some people out of bed and on parade longer) was trivial; it was almost an abuse of language to call it a threat in circumstances such as these. *Reg.* v. *Harris-Rivett*[9] showed what exercised the minds of the court in applying the Judges' Rules in military matters.

On the question of causation, if what happened was a natural, probable and foreseeable consequence of what was done, anything coming in between was not truly a novus actus interveniens: *Haynes* v. *Harwood.*[10] Even the wrongful act of a third party, if it is something which should reasonably be anticipated, will not break the chain of causation. Applying the general principle to the facts of this case, if a person is stabbed in the middle of a general affray it must be expected that he is not going to be treated in the best possible way at the most immediate moment. [Counsel referred to *The Oropesa.*[11]]

Lord Parker C.J. stated the facts and continued: The court is quite clear that while there was nothing improper in the action taken by the regimental sergeant-major, the evidence of what took place was clearly inadmissible at the prisoner's trial. What the sergeant-major did might well have been a very useful course of action in order to enable further inquiries to be made, but the court is satisfied that if the only evidence against the prisoner was a confession obtained in those circumstances, it would be quite inadmissible at his trial. It has always been a fundamental principle of the courts, and something quite apart from the Judges' Rules of Practice, that a prisoner's confession outside the court is only admissible if it is voluntary. In deciding whether an admission is voluntary the court has been at pains to hold that even the most gentle, if I may put it in that way, threats or slight inducements will taint a confession. To say to all those on parade, "You are staying here and are "not going to bed until one of you owns up" is in the view of this court clearly a threat. It might also, I suppose, be looked upon as an inducement in that the converse is true, "If one of "you will come forward and own up, the rest of you can go "to bed"; but whichever way one looks at it, the court is of opinion that while the action was perfectly proper and a useful start no doubt to inquiries, evidence in regard thereto was clearly inadmissible.

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[7] (1862) 2 F. & F. 857.

[8] [1954] 1 W.L.R. 228; [1954] 1 All E.R. 373.

[9] [1956] 1 Q.B. 220; [1955] 3 W.L.R. 823; [1955] 3 All E.R. 567.

[10] [1935] 1 K.B. 146; 51 T.L.R. 100.

[11] [1943] P. 32; [1943] 1 All E.R. 211.

The matter, however, does not rest there because at about 7.30 the next morning Sergeant Ellis from the Special Investigation Branch came down to make inquiries, and he, when he first saw the appellant, gave him the usual caution. He, however, went on to refer then to what had happened the night before. Apparently after administering the caution, he said, "There was "a disturbance last night in a barrack-room in Polish Barracks. "I understand that after the disturbance you admitted to your "R.S.M. that you had been involved and that you stabbed "three men of the Gloucestershire Regiment." Apparently Sergeant Ellis by then had been told that three men were involved. The prisoner replied: "Yes, I am not denying it. I "stabbed three of them all right." He was then asked if he wished to make a statement. He said: "Yes." A written caution was then made which the prisoner signed, and there followed a statement which I need not read, but which admitted that he had stabbed about three of them altogether with a bayonet which he found on the floor of the room.

It is urged by Mr. Bowen on his behalf that the original taint in the confession given to the sergeant-major really persisted in these later confessions, both oral and in writing, and in particular he points to the fact, as I have said, that Sergeant Ellis at the outset referred to what had taken place or what was said to have taken place the evening before. Mr. Bowen also referred us to a number of cases. It is unnecessary to refer to them in detail. He starts with *Rex* v. *Meynell*[1] in 1834, where in regard to a second confession Taunton J. said[2]: "I "am clearly of opinion that it is not receivable; it being im-"possible to say that it was not induced by the promise which "the constable made to her in the morning." In other words, he was saying that the second statement was inadmissible in that a promise made when the first statement was given was still in operation when the second statement was given. To the same effect was the opinion of Patteson J. in *Sherrington's* case,[3] where he said: "There ought to be strong evidence to show "that the impression under which the first confession was made, "was afterwards removed, before the second confession can be "received. I am of opinion, in this case, that the prisoner must "be considered to have made the second confession under the "same influence as he made the first; the interval of time being "too short to allow of the supposition that it was the result of "reflection and voluntary determination." I should observe that in neither of those cases was a caution administered before the second statement was obtained.

He also refers to an Irish case of *Reg.* v. *Doherty*,[4] where Whiteside C.J., in ruling on the admissibility of the second statement, said[5]: "The judges have held that it must be shown that "the prisoner thoroughly understood that he could expect no "gain from a confession. The subsequent caution must be shown "to have had the effect of removing all such expectation from "the prisoner's mind." Again, in *Reg.* v. *Rosa Rue*, Denman J. said[6]: "There are cases which hold that a confession once "rejected on the ground that it was made under an inducement "does not become admissible merely from the fact that it was "again made to some other person who has not held out an "inducement, the inducement being deemed to be a continuing "one. But I am not at this moment aware of any case in which "it has been held that, where the person who held out the "inducement is absent, then a confession made to a third party "is not admissible, no fresh inducement having been held out. "The general principle is clear, that if it is made out to the

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[1] (1834) 2 Lew.C.C. 122.
[2] Ibid. 123.
[3] (1838) 2 Lew.C.C. 123, 124.
[4] (1874) 13 Cox C.C. 23.
[5] Ibid. 24.
[6] (1876) 13 Cox C.C. 209, 210.

"satisfaction of the judge that the statement was not made "voluntarily, it is not admissible. It is not merely a question "as to whom the confession is made or when it is made; but "it is a matter in which you have to get at the mind of the "prisoner, and see whether or not it is probable that the confession was made voluntarily, in the proper sense of the word." Having consulted Kelly L.C.B., Denman J. held on the facts of that case that the second statement was so connected with the original inducement as to be inadmissible.

The court thinks that the principle to be deduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time-limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.

In the present case the judge-advocate never had to consider or rule on this second statement. Having admitted the first statement, there was no question on that basis but that the second statement must be also admissible. Accordingly, he never had to rule on the question of admissibility. He never had to exercise any discretion in the matter, and there was no occasion for his leaving it to the court as to the value or weight to be attached to the confession. This court, however, is of the clear opinion that the second statement was admissible. No doubt the opening reference to what it was said he had said to the regimental sergeant-major put the appellant in a difficulty. No doubt it was introduced by Sergeant Ellis in the hope that thereby he might get a continued confession; but it is clear that the effect of any original inducement or threat under which the first statement was made had been dissipated. Quite apart from the fact that the caution was given and given twice, some nine hours had elapsed and the whole circumstances had changed. The parade had ended. The rest of the company had gone to bed. The effect of the threat or the inducement was spent. On those grounds this court has come to the conclusion that the oral and written statements made to Sergeant Ellis were clearly admissible.

The second ground concerns a question of causation. The deceased man in fact received two bayonet wounds, one in the arm and one in the back. The one in the back, unknown to anybody, had pierced the lung and caused haemorrhage. There followed a series of unfortunate occurrences. A fellow-member of his company tried to carry him to the medical reception station. On the way he tripped over a wire and dropped the deceased man. He picked him up again, went a little farther, and fell apparently a second time, causing the deceased man to be dropped onto the ground. Thereafter he did not try a third time but went for help, and ultimately the deceased man was brought into the reception station. There, the medical officer, Captain Millward, and his orderly were trying to cope with a number of other cases, two serious stabbings and some minor injuries, and it is clear that they did not appreciate the seriousness of the deceased man's condition or exactly what had happened. A transfusion of saline solution was attempted and failed. When his breathing seemed impaired he was given oxygen and artificial respiration was applied, and in fact he died after he had been in the station about an hour, which was about two hours after the original stabbing. It is now known that having regard to the injuries which the man had in fact suffered, his lung being pierced, the treatment that he was given was thoroughly bad and might well have affected his chances of recovery. There was evidence that there is a tendency for a wound of this sort to heal and for the haemorrhage to stop. No doubt his being dropped on the ground and having artificial respiration applied would halt or at any rate impede the chances of healing. Further, there were no facilities whatsoever for blood transfusion, which would have been the best possible treatment. There was evidence that if he had received immediate and different treatment, he might not have died. Indeed, had facilities for blood transfusion been available and been administered, Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as 75 per cent.

In these circumstances Mr. Bowen urges that not only was a careful summing-up required but that a correct direction to the court would have been that they must be satisfied that the death of Private Creed was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it. If there was, says Mr. Bowen, any other cause, whether resulting from negligence or not, if, as he contends here, something happened which impeded the chance of the deceased recovering, then the death did not result from the wound. The court is quite unable to accept that contention. It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court which will convey in simple language the principle of causation. It seems to the court enough for this purpose to refer to one passage in the judgment of Lord Wright in *The Oropesa*, where he said [7]: "To break the chain of causation it must be shown that there is "something which I will call ultroneous, something unwarrant-"able, a new cause which disturbs the sequence of events, "something which can be described as either unreasonable or "extraneous or extrinsic." To much the same effect was a judgment on the question of causation given by Denning L.J. in *Minister of Pensions* v. *Chennell.*[8]

Mr. Bowen placed great reliance on a case decided in this court of *Reg.* v. *Jordan*, and in particular on a passage in the headnote which says [9]: ". . . that death resulting from any "normal treatment employed to deal with a felonious injury may "be regarded as caused by the felonious injury, but that the "same principle does not apply where the treatment employed is "abnormal." Reading those words into the present case, Mr. Bowen says that the treatment that this unfortunate man received from the moment that he was struck to the time of his death was abnormal. The court is satisfied that *Jordan's* case was a very particular case depending upon its exact facts. It incidentally arose in this court on the grant of an application to call further evidence, and leave having been obtained, two well-known medical experts gave evidence that in their opinion death had not been caused by the stabbing but by the introduction of terramycin after the deceased had shown that he was intolerant to it, and by the intravenous introduction of abnormal quantities of liquid. It also appears that at the time when that was done the stab wound which had penetrated the intestine in two places had mainly healed. In those circumstances the court felt bound

[7] [1943] P. 32, 39.

[8] [1947] K.B. 250.

[9] (1956) 40 Cr.App.R. 152.

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to quash the conviction because they could not say that a reasonable jury properly directed would not have been able on that to say that there had been a break in the chain of causation; the court could only uphold the conviction in that case if they were satisfied that no reasonable jury could have come to that conclusion.

In the present case it is true that the judge-advocate did not in his summing-up go into the refinements of causation. Indeed, in the opinion of this court he was probably wise to refrain from doing so. He did leave the broad question to the court whether they were satisfied that the wound had caused the death in the sense that the death flowed from the wound, albeit that the treatment he received was in the light of after-knowledge a bad thing. In the opinion of this court that was on the facts of the case a perfectly adequate summing-up on causation; I say " on the facts " of the case " because, in the opinion of the court, they can only lead to one conclusion: a man is stabbed in the back, his lung is pierced and haemorrhage results; two hours later he dies of haemorrhage from that wound; in the interval there is no time for a careful examination, and the treatment given turns out in the light of subsequent knowledge to have been inappropriate and, indeed, harmful. In those circumstances no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that the death resulted from the original wound. Accordingly, the court dismisses this appeal.

Appeal dismissed.

Solicitors: *Registrar, Courts-Martial Appeal; Director, Army Legal Services.*

J. D. P.

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UNION NATIONALE DES COOPERATIVES AGRICOLES DE CEREALES *v.* ROBERT CATTERALL & CO. LTD.

[1958 M. No. 1107.]

Arbitration — Award — Enforcement — Foreign award — Unenforceable locally without order of local court—Whether " final "—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 26, 36, 37.

By an agreement in French made in Paris, dated August 31, 1956, the appellants agreed to sell to the respondents a quantity of

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wheat seed. The agreement contained an arbitration clause, the English translation of which was: "All differences arising out of "the present contract will be judged by the Arbitration Chamber "of Copenhagen which will settle without appeal with the powers of "an amicable arbitrator." Differences having arisen between the parties they were referred pursuant to the arbitration clause to the Copenhagen Chamber of Arbitration. Under the rules regulating the procedure of the arbitration chamber, awards are made by a committee of the chamber. Regulation 14 of the rules provides that: "awards made by the committee . . . shall be final. An award "can only be appealed against to the appeal court attached to the "committee . . . If the presidency decides that the appeal cannot "be made . . . the award made by the judgment and arbitration "committee shall be final. . . ." By an order of October 6, 1958, the committee awarded to the respondents the sum of £183,000. The presidency of the arbitration committee on November 25, 1958, refused the appellants' application for leave to appeal and notified them that the award of October 6, 1958, was final. The award could not be enforced in Denmark without an order of a Danish court. The respondents, by summons under sections 36 and 26 of the Arbitration Act, 1950,[1] which applies to arbitration awards made in Denmark, applied for leave to enforce that award. The appellants claimed that the award was a foreign award and had not become final in the country in which it was made:—

Held, that, on the facts, the award had been made in conformity with Danish law, the law governing the arbitration procedure and was a final award in Denmark, the country where it was made, and satisfied the conditions of section 37 (1) (*c*) and (*d*) of the Arbitration Act, 1950. The fact that the award was not directly enforceable in Denmark until a judgment of the Danish courts had been obtained did not prevent the award being a final award within section 37 (1) (*d*) and, accordingly, section 36 (1) applied to it and it was enforceable in the same way as an English award.

In re Boks & Co. and Peters, Rushton & Co. Ltd. [1919] 1 K.B. 491 considered.

Decision of Hinchcliffe J. affirmed.

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[1] Arbitration Act, 1950, s. 26: "An award on an arbitration agreement may, by leave of the High "Court or a judge thereof, be enforced "in the same manner as a judgment "or order to the same effect . . ."

S. 36: "(1) A foreign award shall, "subject to the provisions of this "Part of this Act, be enforceable in "England either by action or in the "same manner as the award of an "arbitrator is enforceable by virtue "of section 26 of this Act."

S. 37: "(1) In order that a foreign "award may be enforceable under this "Part of this Act it must have . . . "(*c*) been made in conformity with "the law governing the arbitration "procedure; (*d*) become final in the "country in which it was made; . . ."

S. 39: "For the purposes of this "Part of this Act, an award shall not "be deemed final if any proceedings "for the purpose of contesting the "validity of the award are pending "in the country in which it was "made . . ."

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UNION NATIONALE DES CO-OPERATIVES AGRICOLES DE CEREALES
v.
ROBERT CATTERALL & CO. LTD.

APPEAL from Hinchcliffe J.

By an agreement in French, dated August 31, 1956, made in Paris between the appellants, Robert Catterall & Co. Ltd., as sellers, and the respondents, the Union Nationale des Cooperatives Agricoles de Cereales, as buyers, the appellants agreed to sell to the respondents a quantity of wheat seed. The agreement contained a provision for arbitration, the English translation of which was as follows: "All differences arising out of the present "contract will be judged by the Arbitration Chamber of Copen-"hagen which will settle without appeal with the powers of an "amicable arbitrator."

Differences having arisen between the parties, they were referred to the committee of the Arbitration Chamber of Copenhagen in accordance with the rules governing arbitrations by that body. By an award of October 6, 1958, the committee found in favour of the respondents and awarded to them approximately £183,000. Rule 14 of the rules governing the procedure of the arbitration chamber provided: "Awards made by the commit-"tee . . . shall be final. An award can only be appealed against "to the appeal court attached to the committee . . . If the "presidency decides that the appeal cannot be made . . . the "award made by the judgment and arbitration committee shall "be final." The rules are more fully stated in the judgment of Lord Evershed M.R.

The appellants applied under that rule for leave to appeal and were notified by letter dated November 25, 1958, signed by the president of the arbitration committee, that their demand for appeal could not be proceeded with, and stating that the award of October 6, 1958, was final.

By this summons the respondents (the applicants to the summons) applied pursuant to sections 36 and 26 of the Arbitration Act, 1950, for leave to enforce the award of October 6, 1958. Denmark being a contracting State for the purpose of the protocol in the First Schedule to the Arbitration Act, 1950, the provisions in Part II of the Act for the enforcement of foreign awards applied.

Hinchcliffe J., affirming the decision of Master Clayton, gave leave to the respondents to enforce the award in the same manner as a judgment or order.

The appellants appealed.

Helenus Milmo for the appellants. The award of the Arbitration Chamber of Copenhagen is not enforceable in this country, in that it does not satisfy the conditions laid down in section 37 (1) (*c*) and (*d*) of the Arbitration Act, 1950. The award was not made in accordance with the law governing the arbitration procedure, nor was it a final award. For an award to be enforceable under section 36 of the Act, it must be a final award in the country where it was made. What is a final award appears from section 39. An award made by the Danish Arbitration Committee is not final until an order of the Danish court has been obtained authorising the enforcement of the award. The Danish procedure is analogous to our procedure under R.S.C., Ord. XIV.

It appears from the decision in *In re Boks & Co. and Peters, Rushton & Co. Ltd.*[2] that the court will not grant leave to enforce an arbitration award if the validity of the award or the right to proceed under it is doubtful. The evidence of the Danish lawyers shows that they are not agreed whether this is a final award or not. There is a serious doubt whether there is now any existing right under Danish law to enforce the award. It follows that it is not enforceable in this country by summary procedure. [Reference was made to Russell on Arbitration, 16th ed., pp. 269, 364.]

Having regard to the decision in *Hamlyn & Co.* v. *Talisker Distillery*[3] it is admitted that Danish law is the law applicable. Unless and until an order of a Danish court has been obtained, this award cannot be enforced in Denmark by execution. The appellants complain of the amount awarded and they want to be able to challenge that award, and to have an opportunity of testing the precise position under Danish law. The respondents should have obtained from the Danish courts a confirmation of the award. The amount involved is considerable. This is a special case and the appellants should not have been prevented from appealing in Denmark unless they lodged the whole sum in court.

W. P. Grieve for the respondents. If the appellants' contention is right, it makes nonsense of the relevant provisions of the Arbitration Act, 1950, and of the protocols and conventions in the Schedules to the Act to which Denmark is a party. Clause 2 of the protocol renders a foreign arbitration award enforceable. The procedure would not be used if it were first necessary to obtain judgment in Denmark, since in that case the procedure for enforcing foreign judgments would apply. No defect has been alleged in regard to the award itself, either in Denmark or here. Finality is defined in section 39 of the Act of 1950. That section is explained by article 1 (*d*) of the Convention in the Second Schedule to the Act. No proceedings for contesting the validity of this award are pending. It is, accordingly, a final award.

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[2] [1919] 1 K.B. 491.

[3] [1894] A.C. 202; 10 T.L.R. 479.

Under the express terms of the contract between the parties there can be no appeal. The parties have here made their own rules; accordingly, this court should not look outside the contract and consider the position under Danish law: *W. Naumann* v. *Edward Nathan & Co. Ltd.*[4] The burden is on the appellants under section 39 to show that steps are being taken to set this award aside.

The last question is whether the award was made in accordance with Danish law. Paragraph 14 of the rules governing the procedure of the Arbitration Chamber of Copenhagen confers complete discretion in the presidency to decide whether to allow an appeal or not. Under rule 14 the award is final. A party to an arbitration cannot, after an award has been made against him, sit tight and do nothing. This award is a final award within section 39 and the conditions laid down in section 37 (1) have been satisfied. The fact that according to the evidence of the Danish lawyers it would be necessary to go to the Danish court before this award could be enforced in Denmark does not mean that the award is not final. An award does not enforce itself. In Denmark, as in England, if the parties do not abide by an award, the assistance of the court has to be invoked. The award was made in accordance with Danish law. There is nothing in the evidence which suggests that it was not.

LORD EVERSHED M.R. By a contract made on August 31, 1956, between the present appellants, as sellers, and the Union Nationale des Cooperatives Agricoles de Cereales, as buyers, provision was made for the sale of certain wheat seeds. The contract contained, according to the English translation, the following provision: "All differences arising out of the present contract "will be judged by the Arbitration Chamber of Copenhagen which "will settle without appeal with the powers of an amicable "arbitrator." The last three words, "an amicable arbitrator," come a little unusually to an English eye, but nothing turns upon what the exact implication of the adjective may be. The words,

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[4] (1930) 37 Ll.L.Rep. 249.

"without appeal," are, in fact, a translation of the French "en dernier ressort," which might be translated more literally as "in the last resort." That variation of phraseology may have a bearing in regard to one of the points which I will mention presently.

There was a difference arising out of the contract, and the matter, accordingly, went before the tribunal mentioned, the Arbitration Chamber of Copenhagen. That chamber's transactions appear to be regulated by general rules of the most formal character. I need not read many of those rules, but paragraph 14 concerns appeals. In view, however, of the terms of the contract, it is to be observed that this is what one might call an internal appeal within the ambit of the arbitration chamber itself; it is not a reference to an appeal to the ordinary courts of Denmark or to any outside tribunal. Paragraph 14 opens with the formula: "The awards made by the committee in respect of the soundness "of the goods contracted for shall be final. An award made can "only be appealed against to the appeal court attached to the "committee for which the following rules are applicable." Later, under the same heading, there is this rule: "The appellant shall be "informed of the time within which he must file his appeal in "writing. . . . The presidency of the committee (the president and "the vice-presidents) are to decide whether the conditions pre-"scribed for the appeal exist and whether or not the appeal has "been properly filed in due time. If the presidency decides that "the appeal cannot be made or that it has not been properly filed "in due time, the award made by the judgment and arbitration "committee shall be final. The presidency shall in special cases "decide upon recommendation," which admittedly means, I think, "upon application," "of a party that an award made "cannot be appealed against unless the appellant gives security, "sufficient in the opinion of the presidency, for the amount which "he is liable to pay," etc. The 15th paragraph of the rules, substituting for "abiding by," the words "submitting to" (which, I think, is the sense of it) reads: "By submitting to "the judgment and award made by the committee, the parties "have unconditionally subjected themselves to the committee's "(including the appeal court's) decision both in substance and "in form, and this decision shall not in any way be overruled and "set aside by the law courts," etc.

The difference having come before the arbitration committee of the chamber, an award was made in favour of the respondents, the French company, for a sum which, translated into figures, is

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said to be £183,000 odd. The date of that award was the beginning of October, 1958. The appellants said they wished to appeal. The presidency, after first stating the view that no appeal lay, ultimately, and after an application, in effect, by the French buyers, said that they would entertain an appeal on terms of payment into the Danish court, which the appellants were unwilling to accept. The appeal procedure within the arbitration chamber, therefore, went out of the picture. Thereupon, the award of £183,000 odd, on the face of it, being unchallenged, the present application was made under the relevant sections of the Arbitration Act, 1950, for an order to enforce the award.

I should refer to such sections of the Arbitration Act, 1950, as appear to be relevant. I turn first to section 26, which provides generally, but not in reference to foreign awards, that: "An "award on an arbitration agreement may, by leave of the High "Court or a judge thereof, be enforced in the same manner as a "judgment or order to the same effect." The matter of foreign awards is covered by Part II of the Act beginning with section 35, and the first subsection of that section enacts what foreign awards are within the scope of that part of the Act. So far as is relevant, the present award is brought within the scope of the Act by virtue of the fact that certain protocols and conventions have been made, the terms of which are set out in the schedules to the Act, being dated in 1923 and 1927, and by virtue of those instruments Denmark, France and the United Kingdom, and parties resident in those countries, are, as regards awards, brought within the scope of Part II. Section 36 (1) to my mind is of importance, for it provides: "A foreign award shall, subject to the provisions "of this Part of this Act, be enforceable in England either by "action or in the same manner as the award of an arbitrator is "enforceable by virtue of section 26 of this Act." Expressing it in less precise language, the effect, I apprehend, of that subsection is that a foreign award, subject to the provisions of this part of the Act and particularly to the provisions of the next section, is put in the same position quoad enforcement as an award of an English arbitrator.

Section 37 contains the conditions for enforcement of foreign awards, and much of the argument in this case turns upon that section. The first subsection is as follows: "In order that a "foreign award may be enforceable under this Part of this Act" —and may I interpose by way of parenthesis, "like an English "award"—"it must have," and then there are various cumulative conditions which must be satisfied, of which I need only refer to (*c*) and (*d*), " . . . it must have (*c*) been made in conformity "with the law governing the arbitration procedure; (*d*) become "final in the country in which it was made." Subsection (2) I can pass over. Subsection (3) provides: "If a party seeking "to resist the enforcement of a foreign award proves that there "is any ground other than the non-existence of the conditions "specified in paragraphs (*a*), (*b*) and (*c*) of subsection (1) of this "section"—and once more I interpose by way of parenthesis to say, but not (*d*)—"the court may, if it thinks fit, either refuse "to enforce the award or adjourn the hearing until after the "expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps "to have the award annulled by the competent tribunal."

Finally, I briefly refer to section 39: "For the purposes of "this Part of this Act, an award shall not be deemed final if "any proceedings for the purpose of contesting the validity of "the award are pending in the country in which it was made." In the well-known textbook, Russell on Arbitration, 16th ed., p. 360, that section has the rubric "Meaning of 'final award.'" If I may say so, perhaps that is rather an overstatement, because I do not read section 39 as being a definition or as meaning that, in the absence of proceedings for contesting the validity of an award, an award must be final—though it may perhaps be of some weight as indicating that some onus is thrown upon a party against whom an award has been made to challenge it, where it may be challenged, if he desires to contest its effect. But for the purposes of this appeal I do not myself place reliance upon section 39.

The points taken and put with characteristic force by Mr. Milmo arise under paragraphs (*c*) and (*d*) of section 37 (1), and of those the latter is the more important. I will, therefore, try to dispose quite briefly of the point under paragraph (*c*), which is to the effect that the award fails to have been made, he says, in conformity with the law governing the arbitration procedure. The point is founded upon the narrative which I have given about appeals to the appeal court within the chamber, and it rests upon the language of paragraph 14 of the rules, and particularly the words "The presidency shall in special cases decide . . ." Put interrogatively, Mr. Milmo says: What are special cases, and why should the terms which the presidency here imposes be conclusive against me? In my judgment, the short answer to that is that the effect of this provision is that in these cases of appeal the widest discretion is plainly given to the presidency. That fact is emphasised by the preceding sentence, which reads, it will be recalled: "If the presidency decides that the appeal cannot "be made or that it has not been properly filed in due time, "the award made by the judgment and arbitration committee "shall be final." I read this part of the paragraph as meaning that it is a matter for the discretion of the presidency to say, according to the circumstances of each particular case, whether in their view they are such, viz., special enough, to require or justify the making of a condition such as the rest of the paragraph envisages. Briefly, therefore, I cannot see that a case has been made to establish failure on the part of this award to have been made in conformity with the law governing the arbitration procedure.

Paragraph (*d*), however, is more formidable, and upon that Mr. Milmo has directed the main part of his argument. In the final analysis the challenge really turns upon the meaning of the word "final." As a prelude to what follows, I bear, of course, in mind the directions which were laid down in *In re Boks & Co. and Peters, Rushton & Co. Ltd.*[1] In this court Swinfen Eady M.R. accepted the practice as stated in Russell on Arbitration, 9th ed., p. 322, and its language is as follows[2]: "'Now that under section 12 of the Arbitration Act, 1889, "'an award may be enforced as a judgment or order, "'although the right to bring an action is not thereby taken "'away, the necessity for an action no longer exists to the same "'extent as formerly; but an action is still the proper mode of "'procedure . . . where the validity of the award or the right to "'proceed upon it is so doubtful that leave to enforce it under "'the above section cannot be obtained.' In my opinion," the Master of the Rolls says, "that is applicable to the present "case, and the validity of the award is so doubtful that leave to "enforce it in a summary manner ought not to be given." The matter is put perhaps rather more favourably to Mr. Milmo by Scrutton L.J., who said[2] that he accepted the view of the Master of the Rolls, which coincided with his own experience, namely, that the summary method of enforcing awards is only to be used "in reasonably clear cases."[3] I will, therefore, assume that if we are to uphold the view taken by Hinchcliffe J. we must be of opinion that this is a reasonably clear case.

I turn back first to the Act. The contest, which I shall more elaborately state in a moment, turns, as I have already said, upon the question: is this award final? I would, however, observe this, that the question seems to me to depend upon section 37 (1) (*d*). We are not here concerned with what use might be given to the word " final " for other purposes, for example, in certain contexts and in certain places what might be said to be the effect of the convention in the second schedule. It must be borne in mind, as a background, that, if the conditions are satisfied, a foreign award is to be put in pari materia, so to speak, with an English award. The question, therefore, is: Has it become final, as we understand that phrase, in the country in which it was made? Of course, the question whether it is final in Denmark will depend no doubt upon Danish law, but the Danish law is directed to showing whether it is final as that word is understood in English. On the face of the matter, as I have narrated the facts, it would appear plain enough that, according to the bargain made between these two parties, this award is final. The two contracting parties have said that they would submit their differences to this arbitration chamber, which will settle " en dernier ressort " the matter in dispute. They have by necessary implication submitted to the rules and regulations of the Danish tribunal, one of which, paragraph 14, states that if the presidency decide against an appeal, then the award is final. If the matter, therefore, rested alone on the documents and the bargain as I find it in the documents, it must be final, I would have said, within the section.

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[1] [1919] 1 K.B. 491.

[2] Ibid. 497.

[3] Ibid. 497.

But it is necessary to see what the Danish law is, and upon that matter there have been filed certain affidavits. Mr. Heyman made an affidavit for the respondents. His qualifications are not in doubt; he is a qualified Danish lawyer and a barrister of the English Bar. He said in the final paragraph of his affidavit: " According to the aforesaid laws and constitution," which is a reference to the Danish tribunal, " the award of October 6 which " was made in conformity with the law governing the arbitration " procedure is final and binding by virtue of the failure of the " respondent to fulfil the conditions for an appeal laid down by " the said arbitration committee." But then the matter was taken up by an affidavit by Mr. Nikkelsen, who I think represented the appellants in the arbitration proceedings and who is also a member of the Danish Bar. Paragraph 3 of his affidavit reads thus: " In my opinion under the laws of Denmark the " aforementioned award has not and will not become final unless " and until it is laid before and acknowledged by the Danish " court which to the best of my knowledge, information and "belief"—and he is, I gather, quite correct—"has not been "done." He then refers in support of his opinion to a textbook, Frivillig Voldgift, by Bernt Hjejle. The passage in that textbook is this—being, of course, in translation: "An arbitral award "need not be final because it is valid (but if it has become final, "it must of course always be considered as valid). It will not "be final until no more objections can be raised to it. In "Denmark no time limit is fixed for raising objections to the "validity of an arbitral award, nor are there any principles in law "frustrating objections by prescription or preclusion. Therefore, "any person will have to obtain legal confirmation in Denmark "of his arbitral award made in Denmark before seeking enforcement in a foreign country according to the Geneva Protocol of "the said award."

It will be convenient to complete the evidence by reference to the further affidavit of Mr. Heyman in reply. He says: "According to Danish law one cannot obtain execution of a "Danish arbitration award in Denmark unless a judgment has "been obtained from the court based on the award. At the "hearing of the action"—I agree with Mr. Milmo that obviously means an application or whatever is the appropriate procedure for obtaining a judgment in the Danish court—"the defendant is "however confined to objections of a formal nature, e.g., that the "arbitration tribunal's procedure rules have not been complied "with. The court will not, apart from these formal defects, "rehear the case." He proceeds: "I respectfully agree with "Mr. Thorvold Nikkelsen that unless and until the arbitration "award referred to in paragraph 4 of my previous affidavit has "been before the Danish courts, it would be open to the respondent to complain that the award suffers from formal defects."

At first sight, of course, it might appear that Mr. Heyman is saying that, according to the law of the country in which this award was made, viz., Denmark, the award is not final as that word is used in section 37 (1) (*d*). But I confess I have come myself to the clear conclusion that that is not right. If it were so (as I think it must follow, and there is much force in this point which Mr. Grieve made) it would mean that you could never in fact enforce an award, as such, in such cases as this; you would have to wait until you got the judgment of the court of the country where the award was made, and then you would not be enforcing the award but the judgment. I venture again to refer to the vital fact, as I think, that Part II, and the conditions to be complied with, is intending to put a foreign award in the same condition as an English award. But looking more closely at the evidence, it seems to me that what clearly has arisen here is a confusion—I am not using the word, and I certainly do not intend to, in a sense critical of the deponents—between finality as intended by the section and enforceability. Reverting to the textbook writer, I think that is made clear enough. He says that an award once final, of course must be valid, and speaks of an award not necessarily being final because it is valid. Those are somewhat philosophical considerations. He goes on, it will be observed, to speak of the possibility of taking objections, contemplating, as it seems to me, perhaps rather as subsection (3) of section 37 does, a challenge being made by the aggrieved party in the appropriate court of competent jurisdiction. But when he comes to his conclusion, introduced by the word " therefore," it is clear that the textbook writer is concerned with enforcement: " Therefore, any person will have to obtain legal confirmation " . . . before seeking enforcement."

Now the question of enforcement here is a matter of English law. Can it now be enforced by the terms of the Arbitration Act? It seems to me, with all respect to Mr. Milmo's argument, that it is reasonably clear that it can. This award is, to my way of thinking, final according to the bargain made and according to the law of Denmark, so far as it is concerned with the problem with which we are presented. It is no doubt not enforceable directly in Denmark or anywhere else; but it is, I think, final within the contemplation of the section. I would add that there is here, so far as I know, no question of any formal challenge. I agree with Mr. Milmo that when it speaks of formal defects, the language, according to the deponents (and particularly in that shown by Mr. Heyman's own affidavit), is not limited to defects on the face of the award, mere matters of form; it will extend to compliance with the rules under which the award was given. But there is, so far as I know, no challenge on that basis; indeed, no precise challenge, so far as I know, at all.

The matter is, I think, not one which admits of useful elaboration, and I therefore say no more than this, that I have come to a clear conclusion in my own mind, in conformity with that of the judge, that for the purposes of section 37 (1) (*d*) this award must be treated as having become " final " according to the relevant law of Denmark, and, that being so, the conditions in other respects being satisfied, section 36 (1) applies to it and it is enforceable in the same way as an English award.

I would, therefore, dismiss the appeal.

C. A.
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UNION NATIONALE DES CO-OPERATIVES AGRICOLES DE CEREALES
v.
ROBERT CATTERALL & CO. LTD.

PEARCE L.J. I agree with all that my Lord has said. The question here is whether it is reasonably clear that the award has been made in conformity with the law governing the arbitration procedure and is final in the country in which it was made, namely, Denmark, so as to satisfy section 37 (1) (*c*) and (*d*) of the Arbitration Act, 1950. That depends on a consideration of the rules and regulations of the Copenhagen Judgment and Arbitration Committee and the affidavits as to Danish law. As to the point that it was not in conformity with the law governing the arbitration procedure, I see no force in it. The rules provide that the presidency shall decide whether an appeal can be made and in special cases shall decide that an award made cannot be appealed against unless security is given by payment of the full amount payable under the award. If it is decided there can be no appeal, then the award is final. I see nothing to show that the presidency was not entitled to make the order that they made in this particular case.

In my view the award has also become final in the English sense of that word. The appellants did not wish to have any adjournment under section 37 (3) so as to entitle them to contest the validity of the award. If it were necessary to recover a Danish judgment before the award becomes final, then that judgment could be enforced, as has been pointed out, quite apart from the provisions of the Arbitration Act, and those provisions would be valueless. It is true that, for the purposes of enforcement, an application has to be made to the Danish courts, but that is not the test here. The test is whether the award is final within the meaning of section 37 (1) (*d*). In my view, for the reasons given by my Lord, it is.

I, therefore, would also dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *P. R. Kimber; Rowe & Maw.*

B. A. B.

MATTHEWS *v.* KUWAIT BECHTEL CORPORATION.

C. A.

[1958 M. 1835.]

1959
April 7, 8.

Sellers and Willmer L.JJ.

Master and Servant—Contract of service—Implied term—Injury to servant—Damages claimed—Writ alleging breach of contract—Duty impliedly owed by master to servant.

Practice and Procedure—Writ—Service out of jurisdiction—Contract or tort—Action by servant against master for personal injuries—R.S.C., Ord. 11, *r.* 1 (*e*).

Contract—Tort or breach of contract.

Judicial Precedent—Decision long ignored—Limbo of lost causes—Whether servant can sue master for negligence in contract.

The plaintiff, while working as a foreman millwright for the defendants in Kuwait under a service agreement made in England and to be "construed and have effect in all respects in accordance "with the law of England," suffered personal injury by falling into a trench. He started proceedings in England, claiming damages from the defendants and alleging that they were in breach of the contract of service.

The defendants having no residence in England but an office in Panama, the plaintiff obtained leave to serve the writ out of the jurisdiction, under R.S.C., Ord. 11, r. 1 (*e*),[1] and the writ was served in Panama.

The defendants appealed, contending that the plaintiff's cause of action was in tort and not in contract, and therefore Ord. 11, r. 1 (*e*), had no application and the service of the writ out of the jurisdiction should be set aside:—

Held, that the common law placed an employer under a duty to take all reasonable care for the safety of his servants in the course of their work; that the plaintiff, having suffered injury owing to the defendants' alleged breach of such duty, was entitled to claim damages either in tort or for breach of contract; and that, having elected to sue in contract, he was entitled under Ord. 11, r. 1 (*e*), to serve his writ out of the jurisdiction, the rules under Ord. 11 having to be read disjunctively, each subsection being complete in itself and independent of the others.

Tassell v. *Hallen* [1892] 1 Q.B. 321; *Davie* v. *New Merton Board Mills Ltd.* [1959] 2 W.L.R. 331; *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555; [1957] 2 W.L.R. 158; [1957]

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[1] R.S.C., Ord. 11, r. 1: "Except in the case of a writ to which "rule 1A of this Order applies, service "out of the jurisdiction of a writ of "summons or notice of a writ of summons may be allowed by the court "or a judge whenever . . . (*e*) the "action is one brought against a "defendant not domiciled or ordinarily resident in Scotland, to "enforce, rescind, dissolve, annul or "otherwise affect a contract or to "recover damages or for relief for or "in respect of the breach of a contract (i) made within the jurisdiction or (ii) made by or through an "agent trading or residing within "the jurisdiction on behalf of a principal trading or residing out of the "jurisdiction, or (iii) by its terms or "by implication to be governed by "English law."

1 All E.R. 125, and dictum of Lord Wright in *Wilsons and Clyde Coal Co.* v. *English* [1938] A.C. 57, 81; [1937] 3 All E.R. 628 applied.

Riley v. *Baxendale* (1861) 6 H. & N. 445 not followed.

Order of McNair J. affirmed.

APPEAL from order of McNair J. in chambers.

On or about April 30, 1957, the plaintiff, John Matthews, entered into a contract in writing with the defendants, Kuwait Bechtel Corporation, through their agents, George Wimpey & Co. Ltd., to go into the service of the defendants as a foreman millwright in Kuwait, or such other location in the Near or Middle East as the company might desire. The plaintiff went out to Kuwait, and on May 28, 1957, met with an accident by falling into a trench when engaged in work on the construction of a pump. The agreement was signed in England and by section 12 provided that it was to be construed and have effect in all respects in accordance with the law of England. It did not specify any obligation by the defendants for the care and safety of the plaintiff. On July 25, 1958, the plaintiff issued a writ claiming damages in respect of personal injury and loss due to the accident, and on January 19, 1959, obtained leave to serve a concurrent writ out of the jurisdiction, namely, in Panama, where the defendants are resident.

The writ as amended read: "The plaintiff's claim is for "damages for personal injuries and loss sustained by the plain- "tiff as a result of an accident which occurred on or about the "28th day of May, 1957, in the course of his employment with "the defendants in the Sheikdom of Kuwait, the said accident "having been caused by breaches by the defendants, their "servants or agents, of contracts of employment entered into "between them and the plaintiff at or about the 30th day of "April, 1957."

The defendants, contending that the plaintiff's cause of action was in tort and not in contract, and therefore was not within the terms of Ord. 11, r. 1 (*e*), of R.S.C.,[1] applied for the service of the writ out of the jurisdiction to be set aside. Master Diamond refused to do so, and on February 26, 1959, McNair J. dismissed the defendants' appeal from that order.

The defendants appealed.

John Stocker for the defendants. The action is brought for damages for personal injuries and is therefore in tort and not in contract. The judge was therefore in error, or misdirected himself in holding that the service of the writ of summons out of the jurisdiction could be allowed under Ord. 11, r. 1 (*e*). It is not disputed that the contract of service was made in England and was to be construed according to the law of England, but the action is in substance an action in tort and Ord. 11, r. 1 (*e*), does not apply. It arises out of the relationship between the parties of master and servant and not out of the contract. The agreement only refers to the obligations of the servant and does not specify any obligation of the employer, and any duty on the employer under the contract would have to be implied. [Reference was made to Salmond on Torts, 12th ed., p. 130; Bullen & Leake, 3rd ed., pp. 362, 363, and to *Riley* v. *Baxendale*.[2]] In *Davie* v. *New Merton Board Mills Ltd.*[3] Lord Reid said that "A "master's duty to his servant with regard to the safety of plant "supplied should, I think, be regarded as part of the law of "tort." Lord Simonds also used words which would appear to support the defendants' contention. In *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[4] Denning L.J. made it clear that the duty of the employer towards his servant arose out of the relationship of the parties. It is from the fact that there is that relationship that the duty of the employer arises and not from the contract. The observations of Denning L.J. in that case were not altogether approved by the House of Lords,[5] but it is submitted that the argument for the defendants does get some support from that case. The vicarious obligations of an employer cannot arise in an action in contract. The distinction between the obligations of an employer under a contract and his obligations under the common law still exist.

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[1] For footnote 1 see p. 57.

[WILLMER L.J. Clause 12 of the contract might be said to import all the liabilities under the law of England.]

The care that the master owes to the servant is such care as is reasonable in the circumstances, and surely the law of England is wide enough to decide what is reasonable care in the circumstances. In the present case there is no scope for implying anything in the contract. Most of the clauses would have no bearing in the trial. Yet it is contended that the action is brought under the contract. Where an action can only succeed if there is a contract, then it is an action in contract, but if it can succeed if brought in another way, then it may be an action in tort and this court has to make a classification.

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[2] (1861) 6 H. & N. 445.

[3] [1959] 2 W.L.R. 331.

[4] [1956] 2 Q.B. 180.

[5] [1957] A.C. 555.

[The following cases were also cited: *Smith* v. *Baker & Sons* [6]; *Wilsons and Clyde Coal Co.* v. *English* [7]; *Maclenan* v. *Segar* [8]; *Denham* v. *Midland Employers Mutual Assurance Ltd.*[9]; *Lochgelly Iron and Coal Co.* v. *M'Mullan* [10] and *Kelly* v. *Metropolitan Railway Co.*[11]]

Geoffrey Howe for the plaintiff. It is sufficient for the plaintiff to show that he has a cause of action which will bring him within one of the issues of sub-rule (*e*) of Ord. 11, r. 1, which are to be read disjunctively. The relationship created by this contract gives the plaintiff a right of action. All that need be shown is that it is reasonably probable that terms sufficient to satisfy the cause of action will be established. In *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[12] Lord Radcliffe said: "Since in modern times the relationship between master and "servant, between employer and employed, is inherently one of "contract, it seems to me entirely correct to attribute the duties "which arise from that relationship to implied contract. It is "a familiar position in our law that the same wrongful act may "be made the subject of an action either in contract or in tort "at the election of the claimant, and, although the course chosen "may produce certain incidental consequences which would not "have followed had the other course been adopted, it is a mistake "to regard the two kinds of liability as themselves necessarily "exclusive of each other." Once the hurdle of showing that certain duties of the employer are to be imported into the contract is surmounted, the plaintiff is entitled to have leave to serve the writ out of the jurisdiction. The fallacy underlying the defendants' argument is that, because an action can lie in tort, therefore it cannot lie in contract. Many of the later authorities decide that it is possible to have two alternative causes of action, and *Smith* v. *Baker & Sons* [13] shows that a prima facie case of contract is sufficient. Lord Tucker in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[14] explained what the law laid down touching this matter. [*Wilsons and Clyde Coal Co.* v. *English*,[15] *Riley* v. *Baxendale* [16] and *Tassell* v. *Hallen* [17] were also referred to.]

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[6] [1891] A.C. 325.

[7] [1938] A.C. 57, 81; [1937] 3 All E.R. 628.

[8] [1917] 2 K.B. 325.

[9] [1955] 2 Q.B. 437; [1955] 3 W.L.R. 84; [1955] 2 All E.R. 561.

[10] [1934] A.C. 1.

[11] [1895] 1 Q.B. 944.

[12] [1957] A.C. 555, 587.

[13] [1891] A.C. 325.

[14] [1957] A.C. 555, 592, 594.

[15] [1938] A.C. 57.

[16] 6 H. & N. 445.

[17] [1892] 1 Q.B. 321.

SELLERS L.J. The plaintiff in this action obtained leave to serve a writ out of the jurisdiction and it has in fact been served on the defendants in Panama. The defendants, who are now the appellants, applied, as they were entitled to under the rules, for the service of the writ to be set aside. That application came before Master Diamond who refused to set aside the service of the writ. McNair J. heard the appeal and he upheld the Master's refusal. The defendants have persisted and have appealed to this court, alleging that the decision not to set aside the service out of the jurisdiction is wrong in the circumstances of this case.

This court has had the advantage of an interesting and sustained argument from counsel for the defendants, who allege that the claim does not fall under Ord. 11, r. 1 (*e*), as it was held to have done by the Master, who gave leave to serve out of the jurisdiction. It is said that it is a claim simply in respect of a tort committed, if at all, in Kuwait, and that there is no jurisdiction to order service out of the jurisdiction. As originally framed the writ does appear to have been a claim in tort, but the writ was amended. So that no technical point can be taken about the state of the writ when the order was made, counsel for the defendants said that he accepted the amendment and would take no point about it and, indeed, he was prepared, if it was so desired, to permit any further amendment of the writ without any objection, if his submission before this court at the present stage that the service out of the jurisdiction was not justified is not sustained.

It appears that on April 30, 1957, the plaintiff entered into a written contract with the defendants. There was entered into concurrently another contract, a preliminary contract, to which no further reference need be made. In substance the agreement was for the plaintiff to go into the service of the defendants as a foreman millwright "in Kuwait or such other location in the "Near or Middle East (hereinafter referred to as 'the Zone of "'Operations') as the company may desire." The agreement was to begin on April 30, 1957. The plaintiff appears to have gone out at some time less than a month after the date of the agreement to Kuwait to carry out his duties under the contract, and unfortunately, on May 28, he met with an accident by falling into a trench when he was engaged in some work on the construction of a pump. He seems to have fallen into the trench because he stepped back into it when trying to avoid a load, swinging from a crane, which was coming towards him. Those facts are derived from an affidavit which the plaintiff put in at one stage in these proceedings.

In the course of that affidavit the plaintiff sets out the duty which he alleges the defendants had infringed. It is said: "It "was the duty of the defendants under and by virtue of the "aforesaid agreements to take all reasonable care by themselves, "their servants or agents, to provide and maintain safe premises, "plant and equipment at any place or places at which I was "to carry out my duties thereunder, and to institute, operate "and maintain a safe system of work and not to expose me "to any unnecessary risk of injury at any such place or places."

Counsel for the defendants has conceded that duties of that character did arise and the only point is whether they arose under this contract. The contention is that such duties arise in tort and not under contract. The importance of that in this particular case is apparent when one turns to the circumstances in which a writ can be served out of the jurisdiction. The plaintiff, at the time in 1958 when he sought to bring these proceedings, had returned to England. The accident happened out in Kuwait. It appears that the defendants are resident in Panama and that is where the writ was in fact served. In those circumstances the plaintiff, seeking to bring his action in these courts and serve out of the jurisdiction, relies on the provisions of Ord. 11, r. 1 (*e*). [His Lordship read the rule and continued:] The rules under Order 11 are to be read disjunctively and each subsection is complete in itself and independent of the others: *Tassell* v. *Hallen*.[1]

The question that has arisen is whether the plaintiff can properly present his case as a case for damages for breach of contract.

The contract, which is a long, printed document, signed by the parties, contains no express reference to the duties placed upon the employers in respect of their standard of care with regard to the premises in which they were engaging the plaintiff to work, or with regard to the provision of plant which he was to use, or with regard to the system of work in which he had to co-operate. Clause 11 of the agreement is a clause dealing with the working conditions, but it imposes obligations only on the employee and makes no reference to the obligations in respect thereof on the part of the employers. Clause 12 of the agreement, which was relied on, is in my view not helpful to the defendants' argument when they seek to say that the agreement does not permit of any implied term with regard to the matter of taking reasonable care for the plaintiff's safety in the course of the work. The clause provides, and admittedly it prevails in this respect, that the agreement "shall be construed and have "effect in all respects in accordance with the law of England." It seems to me that the law of England is one which does permit terms in these matters to be implied into the contract. So far it is against the contention that the agreement can have no such implication.

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[1] [1892] 1 Q.B. 321.

The other part of Clause 12 is as follows: "The agreement "embodies the whole arrangements between the parties with "reference to the employment agreement hereby constituted, "and all previous correspondence and negotiations, whether oral "or written, shall be excluded." I think none of those terms is anything like adequate to exclude or, indeed, was ever intended to exclude any term which would normally be implied into the contract if in fact there are such terms. That is the agreement.

The right of the plaintiff to invoke the procedure under Order 11, to which I have referred, is dependent upon whether the action which he seeks to bring is one in respect of a breach of contract and turns on whether the matter of which he complains is the subject of a contract, or whether, as the defendants allege, it is only a matter of liability in tort. I am bound to say that from such experience as I have had in this branch of the law I should have held the view, quite apart from recent high authority, that the claim which the plaintiff would wish to make here could be made either in tort or in contract. It has surely been frequently so pleaded without exception being taken. But Mr. Stocker, in his argument, has referred to a good many authorities and has argued with some persistence that this type of claim can arise only in tort and cannot be framed in contract.

I should turn at once, not to the old authorities, but to the more recent ones because, as it chances, the matter was considered recently in the House of Lords. The latest case is *Davie* v. *New Merton Board Mills Ltd.*,[2] where the question arose whether the employers were liable for defects in some tool which they had bought in the open market for the use of their workman, who was injured by reason of some defect in the tool. In considering the question, Lord Simonds made certain observations from which I read a very brief extract[3]: "The same act

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[2] [1959] 2 W.L.R. 331.

[3] Ibid. 336.

"or omission by an employer may support an action in tort or "for breach of an implied term of the contract of employment, "but it can only lead to confusion, if, when the action is in tort, "the court embarks on the controversial subject of implied contractual terms."

In truth, the difference between a claim in tort and a claim in contract, at any rate in its more conventional form, without alleging any special implied term, or any very special obligation, is very rarely one which calls for any consideration at all. The difference between the two in the majority of circumstances does not matter. It may be that it is because of that that the majority of the cases have not dealt with it in the way one might have expected to find. So far as I can see, the distinction matters in two cases—there may be others—one, where there is a desire to serve out of the jurisdiction, which is the very case we have now under consideration; another has arisen and may arise in the county court jurisdiction where the basis of costs may be different according to whether the action which is brought and decided in the county court was framed in contract or in tort. But the matter is not much aided there so far as the solution of this case is concerned because of the fact that the costs in the county court are higher in respect of a claim in tort than in the case of contract and the action would certainly be more normally framed in tort rather than in contract. The position is somewhat different at the end of the case when costs come to be considered in the county court, when it will be known whether the action, as it has been contested before the court, has been contested as a matter of contract or as a matter of tort.

The issue for consideration now is whether this action can for the purposes of this rule be framed in contract. I have referred to what Lord Simonds said in *Davie* v. *New Merton Board Mills Ltd.*[3] Lord Reid made some observations which are more helpful to the defendants in this matter. He said[4]: "A master's duty to his servant with regard to the safety of "plant supplied should, I think, be regarded as part of the law "of tort. Vicarious liability is well recognised and I see no "difficulty in principle in extending vicarious liability beyond "liability for those who are, strictly speaking, servants, but it "would, I think, be going far beyond anything reasonable to "extend it to cover a case where there was no relationship

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[3] [1959] 2 W.L.R. 336.

[4] Ibid.

"whatever between the master and the negligent person or his "employer at the time when the negligence occurred. Then I "take the other possible way of regarding the master's duty. It "was common at one time to regard it as depending on the "contract of employment, and indeed, it was this view which "was largely responsible for the convention of the rule of com-"mon employment. No doubt this view leaves the court much "scope, but I think it has always been recognised that an im-"plied term must at least be reasonable." Then he went on to consider the proposed implied term in the case, so that one cannot say that Lord Reid was coming down without any qualification on the side of this particular claim being founded only in tort and not upon the basis of contract or implied term.

Indeed, it would appear that the balance of opinion in the cases over a long period, going back to 1861, and from there onwards, has been that the action may be framed within limits on either basis. The House of Lords had occasion to consider the matter in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[5] It is true that in that case the House was looking at the obligations imposed by the contract of service on the workman, but notwithstanding the contention of Mr. Stocker to the contrary, I think that the reasons which establish that terms which place an obligation of care under the contract can be implied in the case of a workman apply equally and even more obviously to the case of the obligation of an employer. I turn first to what Lord Simonds said [6] on this topic with which we are concerned: "I have already said that it does not appear to me to make any "difference to the determination of any substantive issue in this "case whether the respondents' cause of action lay in tort or "breach of contract. But, in deference to Denning L.J., I "think it right to say that I concur in what I understand to "be the unanimous opinion of your Lordships that the servant "owes a contractual duty of care to his master, and that the "breach of that duty founds an action for damages for breach "of contract, and that this (apart from any defence) is such a "case. It is trite law that a single act of negligence may give "rise to a claim either in tort or for breach of a term express "or implied in a contract. Of this the negligence of a servant "in performance of his duty is a clear example."

Lord Radcliffe reveals [7] that the same sort of argument which has been advanced here arose in the House of Lords: "It was

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[5] [1957] A.C. 555; [1957] 2 W.L.R. 158; [1957] 1 All E.R. 125.

[6] [1957] A.C. 555, 573.

[7] Ibid. 587.

"much canvassed in argument before your Lordships whether, "if there was some such duty on the appellant, it was anything "more than the general duty he owed the world to avoid the "tort of negligence. On one view of the case this would indeed "be a question of some importance in respect of costs. Since "I take a different view as to the proper result of the case "anyway, I do not need to dwell on this part of it. It is perhaps sufficient if I say that, in my view, this question is a "somewhat artificial one. The existence of the duty arising out "of the relationship between employer and employed was recognised by the law without the institution of an analytical inquiry "whether the duty was in essence contractual or tortious. What "mattered was that the duty was there. A duty may exist by "contract, express or implied. Since, in any event, the duty "in question is one which exists by imputation or implication "of law and not by virtue of any express negotiation between "the parties, I should be inclined to say that there is no real "distinction between the two possible sources of obligation. "But it is certainly, I think, as much contractual as tortious. "Since in modern times the relationship between master and "servant, between employer and employed, is inherently one of "contract, it seems to me entirely correct to attribute the duties "which arise from that relationship to implied contract. It is "a familiar position in our law that the same wrongful act may "be made the subject of an action either in contract or in tort "at the election of the claimant, and, although the course chosen "may produce certain incidental consequences which would not "have followed had the other course been adopted, it is a "mistake to regard the two kinds of liability as themselves "necessarily exclusive of each other."

Lord Tucker begins his speech by stating his view[8] "that a "servant employed to drive a vehicle in the course of his employment by his master owes a duty to his master to take reasonable "care in the driving and management of the vehicle, that for "breach of this duty an action founded on contract can be "brought by the master against the servant, and that damages "which have been awarded against the master by reason of the "servant's negligence or breach of this duty are not too remote "to be recoverable in the master's action against his servant." Later Lord Tucker said[9]: "Some contractual terms may be "implied by general rules of law. These general rules, some of

[8] [1957] A.C. 592.

[9] Ibid. 594.

"which are now statutory, for example, Sale of Goods Act, Bills "of Exchange Act, etc., derive in the main from the common law "by which they have become attached in the course of time to "certain classes of contractual relationships, for example, landlord and tenant, innkeeper and guest, contracts of guarantee "and contracts of personal service. Contrasted with such cases "as these are those in which, from their particular circumstances, "it is necessary to imply a term to give efficacy to the contract "and make it a workable agreement in such manner as the parties "would clearly have done if they had applied their minds to the "contingency which has arisen. There are the 'officious by-"'stander' type of case, to use MacKinnon L.J.'s well-known "words. I do not think the present case really comes in that "category, it seems to me to fall rather within the first class "referred to above." Then he sets out some of the recognised implied terms that the contract imposed on the servant in the contract of service between him and the employer.

The argument of counsel for the defendants was that the common law had imposed certain duties upon employers in regard to the safety of the workman in the course of his work but the obligation so imposed, it was said, was entirely in tort. That the duties arose from the common law I think is established. That was the view of the law taken in *Wilsons and Clyde Coal Co.* v. *English.*[10] I do not need to make any citation from it. The admitted obligations which are imposed on the employer were restated in that case by Lord Wright, who cited from the speech of Lord Cairns in *Wilson* v. *Merry.*[11] The question is whether those duties are contractual duties. The authorities to which I have referred show that they may be implied terms of the contract, attached to or incorporated in the contract, to apply Lord Tucker's view. It is at the election of the workman in circumstances such as these whether, relying on the recognised common law duties as established by Lord Cairns' speech in *Wilson* v. *Merry* [11] and following decisions, he will sue in contract or sue in tort. In this case, if it suits his purpose, he may sue in contract. It may be that that will have a somewhat limiting effect on his rights against the employer as compared with his more extensive right at common law if he sues in tort, but I make no further comment on that.

These authorities seem to me to establish that on the facts of

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[10] [1938] A.C. 57, 81; [1937] 3 All E.R. 628.

[11] (1868) L.R. 1 Sc. & Div. 326, 332.

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this case an action does lie in contract, and on the basis of these implied terms which the plaintiff seeks to invoke. If he establishes a breach of those terms, then he would appear to have a cause of action entitling him to damages.

I do not wish to prolong this judgment on an interlocutory matter by referring to cases quoted by counsel for the defendants with regard to costs in the county court. I think they approach the matter from a different point of view, dependent on how the action was, in fact, contested before the court, and do not help in any way his argument that an action does not lie for breach of contract.

Counsel for the defendants relied further on passages in Salmond on Torts, 12th ed., at p. 130, where there is an extract incorporated in the context from a work by Munkman, pp. 60 and 61, to the effect that, although the relationship of master and servant is based upon contract, this obligation is imposed by the law of tort and is not to be regarded as an implied term in the contract of service. Those passages I think require consideration in the light of the authorities I have quoted. Counsel also referred to a passage in Bullen and Leake, 3rd ed., p. 363, and from that he derived an authority in 1861 of *Riley* v. *Baxendale*,[12] in which the court there, consisting of Pollock C.B., Martin and Wilde BB., expressed the view that such an action as was contemplated here could not be framed in contract. There the declaration alleged that "J. R. was a servant of the defendants "on the terms that the defendants should take due and ordinary "care not to expose the said J. R. to extraordinary danger and "risk in the course of his said employment," and it was held that those terms could not be made the subject of a claim in contract. It was put in this way by Martin B.: "There has been a series "of cases in which the duty of the master has been improperly "declared upon as a contract. This imposes a difficulty on the "defendant by making it impossible for him to demur, and that "all he can do is to deny the contract. I am of opinion that on "the hiring of a servant no such contract as this is to be implied; "there is a mere contract of service."

The other judgments are to the same effect. Mr. Howe, on behalf of the respondent to the appeal, the plaintiff, sought to say that the decision turned on procedure. I am inclined to think that case expresses a view of the law contrary to that which has been expressed in the House of Lords and which I have cited

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[12] (1861) 6 H. & N. 445.

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here. I think the best way to deal with that case is to say that it goes into the limbo of lost causes.

In my view, this appeal fails, and the view taken by the master and the judge in this matter was the correct view and should not be interfered with. Therefore, the appeal must be dismissed.

WILLMER L.J. My Lord has covered the ground so fully that I find it unnecessary to say anything more than that I wholly agree with what has fallen from him.

Appeal dismissed.

Solicitors: *L. Bingham & Co.; Denton, Hall & Burgin.*

A. W. G.

In re HUNT.

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April 13, 14, 15.

Hodson, Romer and Pearce L.JJ.

Contempt of Court—Committal order—Litigant in person—Whether privileged from arrest—Civil contempt.

Arrest—Privilege from—Court precincts—Litigant in person—Civil contempt.

On a motion by defendants in an action for committal of the plaintiff for contempt of court in failing to attend an appointment before an examiner of the court, pursuant to R.S.C., Ord. 42, r. 32, the plaintiff defended himself in person and the judge ordered him there and then to be committed, and he was arrested in court and taken to Brixton Prison. He applied for a writ of habeas corpus claiming that he had been wrongfully arrested on the ground, inter alia, that he was privileged from arrest while he was in court to conduct his case in person. The Divisional Court refused the application. On appeal:—

Held, that the only privilege from arrest that existed in the circumstances was a privilege of the court to ensure that justice was done by preventing anyone properly before the court from being arrested, so that the appeal failed.

Cameron v. *Lightfoot* (1778) 2 Wm.Bl. 1190 applied.

In re Freston (1883) 11 Q.B.D. 545 considered.

Decision of the Divisional Court [1959] 1 Q.B. 378; [1959] 2 W.L.R. 95; [1959] 1 All E.R. 73 affirmed.

Appeal from the Divisional Court.

On November 4, 1958, Allied Bakeries Ltd. brought a motion before Wynn-Parry J. to commit Kenneth Douglas Hunt, who had brought an action against them, to Brixton Prison for contempt of court in failing to attend an appointment before an examiner of the court. Hunt defended the motion in person. The judge, being of the opinion that Hunt had no intention of attending any examination that might be fixed, ordered him then and there to be committed to Brixton Prison. Hunt applied for habeas corpus on the ground (inter alia) that he was privileged from arrest while in court to conduct his case in person. The Divisional Court having rejected his application, he appealed.

The appellant in person. The arrest in court of a litigant in person is wrongful; he is acting as an advocate and has the privilege, accordingly, of freedom from arrest while in court and while proceeding to and from the court. Moreover, this was a civil contempt, which would not justify such an arrest. Where the freedom of the subject is concerned, there must be absolute certainty, and, if there is any doubt, the person arrested must be freed. The judgments below and in the previous case indicate that there is some doubt in this case. [He referred to *Cameron* v. *Lightfoot*[1]; *In re Freston*[2]; *In re Evans*[3]; *Townend* v. *Townend*[4]; *Hobern* v. *Fowler, Ex parte Hobern,*[5] and *Young* v. *Young.*[6]]

J. R. Cumming-Bruce for the Governor of Brixton Prison.

Bernard Gillis Q.C. and *W. Denny* for Allied Bakeries Ltd.

Counsel for the respondents were not called upon.

Hodson L.J. This is an appeal from the Divisional Court presided over by Lord Parker C.J., the other members of the court being Cassels and McNair JJ. The decision was given on December 16, 1958, when they refused an application by Hunt, the appellant, for a writ of habeas corpus. Hunt was committed to prison, having been adjudged to be in contempt of an order of the court, by Wynn-Parry J. on November 4, 1958. He was acting in person and conducted his own case and claimed privilege from arrest as he was in court, but nevertheless he was, in accordance with the ordinary practice in these cases, arrested in court. He has claimed that his arrest was contrary to law and he is entitled to be released. In answer to the writ, the Governor of the prison has relied upon the order of Wynn-Parry J. dated November 4, 1958, and the warrant of committal.

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[1] (1778) 2 Wm.Bl. 1190.
[2] (1883) 11 Q.B.D. 545.
[3] [1893] 1 Ch. 252.
[4] (1905) 22 T.L.R. 50.
[5] (1892) 62 L.J.Q.B. 49; 9 T.L.R. 6.
[6] (1896) 12 T.L.R. 503.

The appellant was not committed to prison, as he at one stage of his argument contended, for non-payment of a debt. He was committed to prison for refusing to obey an order of the court, the order being that he should attend before an examiner. It is true that the attendance before the examiner was in aid of the enforcement of a civil debt; the purpose of the examination was that he might be examined as to his means, but the contempt of court of which he was found guilty was the failure to obey an order. The court was acting in a matter of discipline, and the object of sending the appellant to prison was not only to punish him, but to induce him to take such steps as lay in his power to put the matter right by purging his contempt. He has taken no steps to that end. A number of appointments had previously been made for his examination which he did not attend, and he did that which he was entitled to do; he appealed to the Court of Appeal against the order of Wynn-Parry J. That appeal came before the court presided over by Jenkins L.J., the other members of the court being Romer L.J. and Roxburgh J., and his appeal was dismissed.[1] He, on that appeal, as he was entitled to do, attacked the order of Wynn-Parry J. He raised a number of points, arguing that the decision was bad on the face of it, that the order was wrongly entitled, that the court had no jurisdiction to make such an order for various reasons, and he also argued that the judge in imposing the penalty had no evidence to support the view which he entertained that the appellant had no intention of complying with the order of the court. The judge had this man before him and heard him address him, and he was able to form an assessment of his attitude. He had the history of the matter before him and the points which had been made. All those matters were ventilated before the Court of Appeal and adjudicated upon.

The appeal having been dismissed, the appellant took another course which was open to him, his liberty having been taken from him. He applied for a writ of habeas corpus to the Queen's Bench Division. In that court[2] he again took the same points as he had taken before the Court of Appeal, in order to show, if he could, that his arrest was wrongful on the ground that Wynn-

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[1] [1959] 1 W.L.R. 50; [1959] 1 All E.R. 37.

[2] [1959] 1 Q.B. 378; [1959] 2 W.L.R. 95; [1959] 1 All E.R. 37.

Parry J. was wrong, whether the order was bad on the face of it or whether the judge in the exercise of his jurisdiction had erred. The court, without holding that those matters, having been determined by the Court of Appeal, were res judicata, the point not having been taken by the Governor of the prison or the opposite party in this matter that it was res judicata, listened to that argument and came to the conclusion that nothing had been said to cast any doubt upon the conclusion reached by Wynn-Parry J. or upon the conclusions reached by the members of the Court of Appeal who heard the appeal from Wynn-Parry J. This court has taken the same course. It has also had no objection taken by the Governor of the prison or the opposite party and it has listened to the same arguments which were put forward, first, before the Court of Appeal, secondly, before the Divisional Court, and, thirdly, before this court. For my part I am of the same opinion as the Lord Chief Justice; I see nothing which causes me to doubt in any way the correctness of the decision arrived at either by Wynn-Parry J. or by the Court of Appeal which affirmed his decision. Lord Parker C.J. at the end of his judgment[3] referred to the question of how far in habeas corpus proceedings the court can in any event inquire into how jurisdiction is exercised as opposed to the question of whether there is jurisdiction to arrest. I have nothing to add to what he said, which I read: "It may be that "the true view is, and I think the cases support it, that though "this court always has power to inquire into the legality of the "committal, it will not inquire whether the power has been "properly exercised."

I now leave the matters which have been repeated ad nauseam in various courts to come to the question which was raised for the first time in the proceedings for habeas corpus which in this respect are separate from the judgment of Wynn-Parry J. The appellant claims that he was wrongly arrested because he was arrested in court immediately after the committal order had been made, whereas he claims he was privileged from arrest. He has taken a subsidiary point that even if the arrest in court could be justified, he was arrested too soon in time, because although the committal order had been made, yet he had not then and did not until after the order was made apply for a stay of execution, nor had costs been dealt with. I will deal with that subsidiary point first to get it out of the way. In my judgment the matter had been disposed of when the committal order was made, and the only questions which remained were dealt with, albeit after he had been arrested, when the appellant was still present in court and when he was able to make an application, as he did, for a stay and to answer, if he could, any application made as to costs. No restraint was put upon him to prevent him exercising his freedom in that matter, so there is no substance in that. So far as the facts of the case are concerned, there is no report of what took place before Wynn-Parry J. except a report in The Times newspaper which shows that an application for a stay was made, and it appears from that report that the judge made no answer, but refused sub silentio by directing that the next case be called on, whereas one of the counsel engaged in the case told the court yesterday that the application was refused by the word "No." To my mind it makes no difference which way it went. The application was made and dealt with, so there is no substance in the point that the arrest was in point of time too soon.

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[3] [1959] 1 Q.B. 378, 383; [1959] 2 W.L.R. 95, 98.

There remains the question whether or not this man, as a suitor in these courts, was protected from arrest. The privilege which is claimed by him is a privilege which attaches to suitors and to jurors, witnesses and advocates, and as the appellant, who has conducted his case with a high degree of intelligence and pertinacity, has submitted, is a privilege which extends to persons, if it exists at all, not only while they are in these precincts but also while they are coming to this court or going home after they have left the court. If the appellant were right in saying that he, as a person found guilty of contempt for disobedience of an order, cannot be arrested promptly by the court itself, it would produce an absurd situation, for indeed the court would be powerless to carry out its orders or to see that its orders were carried out until, presumably, the appellant had reached his home, wherever that home might be. It would be a kind of chase which would only start perhaps at Land's End or wherever the home of the litigant in a given case might be. That shows, I think, the absurdity of the proposition and its inherent improbability.

When one examines the position as to privilege from arrest, one finds it is pefectly clear. It was stated by De Grey C.J. in *Cameron* v. *Lightfoot*.[4] That was a case in which the privilege, which, of course, is a privilege of the court and not a privilege of the person at all, was in question because the plaintiff in a former cause endeavoured to arrest a litigant in another cause while he was dining at a tavern on his return from attending the Court of Common Pleas, and the question under discussion was whether that arrest was timely or not. The court put the matter very plainly in this way: "In the present case there is "no irregularity in the process itself, but only in the time of "executing it. The question, therefore, is whether the privilege "of the King's Court, extended to suitors redeundo, so vitiates "an arrest, or suspends the operation of the writ, that the taking "a man thereon, becomes an act of trespass to the party taken. "The ancient way of availing oneself of the privilege of the "courts was by suing out a writ of privilege. But this privilege "is not considered as the privilege of the person attending the "court, but of the court which he attends. And therefore the "allowing or not allowing the privilege is discretionary; and it "hath been disallowed in collusive actions and in vexatious "ones."

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[4] (1778) 2 Wm.Bl. 1190, 1192.

That, I think, is really sufficient to dispose of the point which the appellant has made that he is entitled to protect himself from the very court which is acting against him. The proposition is, as I say, absurd and is supported by no authority whatsoever. The case has been dealt with, and I have dealt with it, on the basis that this is a class of ordinary contempt, which, although punishable as an offence and not a matter of mere technicality, would if the shelter of privilege were available enable this litigant to come within it. The appellant, as he undoubtedly was entitled to, invited the court so to hold, relying on the observations of Lord Redesdale L.C. in *M'Williams'* case,[5] which are cited in *In re Freston*[6] by Sir William Brett M.R. Lord Redesdale said: "There can be no doubt that the thing to be con-"sidered is, not the form of the process but the cause of issuing "it; if the ground of the proceeding be a debt, it is a process "of debt; if the ground be a contempt, as for instance, dis-"obedience of some order of the court, where the object was not "to recover a debt by means of the process, the consequences "of such a process are in some degree of a criminal nature." The appellant insists that whether this order was an order in respect of a debt or not, the object of it was to recover a debt by means of his examination before an examiner. I would also draw attention to the observations of the other members of the court who drew attention to the fact that disobedience to an order of the court is of various kinds and is often wilful.

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[5] (1803) 1 Sch. & Lef. 169, 174.

[6] (1883) 11 Q.B.D. 545, 553.

Lindley L.J. referred[7] to the fact that "some contempts are "merely theoretical, but others are wilful, such as disobedience "to injunctions or to orders to deliver up documents—in these "cases there is no privilege from arrest." Fry L.J. pointed out[8] that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist, and he went on to say: "Further, if the attachment were mere process, "Freston could obtain his discharge ex debito justitiae on showing that he had performed what was required by the master's "order; I do not think that he could have done so in the present "case." That was a case of a solicitor, and he was sent to prison, in the view of the Master of the Rolls, at any rate, because as an officer of the court he had disobeyed an order, and his particular offence was that as an officer of the court he had special duties to perform. The fact remains that in this case the appellant is not in a position to say he can obtain his release from prison as of right by payment of the debt. He has disobeyed an order, and although it is open to him to come to the court at any time and express his willingness to put the matter right so far as he can and seek to obtain his release, yet he is not in a position to say he is entitled to his release as of right, nor is he in a position to say that this exercise of the court's power was not disciplinary and not of a punitive character. It was.

There remains only one point with which I think I need deal, and that is this. The appellant again, rightly I think, contends that where there is any doubt as to whether the liberty of the subject has been infringed, he should be released, and he prays in aid, as he says, doubts which were expressed in the course of argument before the Divisional Court and doubts which he says were expressed in the judgment of Jenkins L.J. There is no trace of any doubt expressed in the judgment of the Divisional Court, although it is said that something was said in argument which gave rise to the view that the Lord Chief Justice entertained some doubt on some point or other. Further, with regard to Jenkins L.J., it is said that one passage of his judgment shows that he had some doubt. The appellant says: "That is enough for me; I must be released." That, I think, shows a wrong appreciation on his part as to what is meant by the word "doubt." There was no doubt expressed in either of the judgments as far as I can see. The judgments were expressed with clarity and certainty. The fact that in arriving at their conclusions conscientious people may have difficulty or take up time in arriving at their conclusion does not in any sense of the word involve to my mind that there was any doubt in the sense in which the appellant uses the word. I would only add that so far as the illustration from the judgment of Jenkins L.J. is concerned, there is nothing in that. The point of difficulty which occurred to him arose on the construction of the rule which provides that a judge or officer of the court should appoint a day for the examination. The appellant in his researches discovered that an officer of the court could not practise as a barrister, and he also discovered that the lady who was appointed examiner was a barrister, and he argued from that that the order was bad. Of course, that does not assist him at all. The only difficulty which arises on the form of the rule is whether the unfortunate lady appointed as the examiner has for ever after disqualified herself from acting as a barrister; it does not affect the validity of the order which the appellant has criticised.

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[7] 11 Q.B.D. 545, 556.

[8] Ibid. 557.

For these reasons I would dismiss this appeal.

ROMER L.J. I agree. On the question to which my Lord has just referred, the point put forward by the appellant that he should be allowed to avail himself of any doubt arising in this case, I would like to say categorically that I entertain no doubt whatever either as to the legality of the committal order or as to the legality of the arrest.

On the question which was argued before the Divisional Court and which was argued before us, and which was not, as I do not think it could have been, argued before this court when it heard the appellant's appeal last November, as to his privilege from arrest in the court, we have not heard full argument on the question as to whether the privilege applies to an order such as that with which we are concerned, and it is not necessary to express a concluded opinion upon the question as to whether that privilege does exist or whether it does not. It is quite clear from the judgments of Lindley and Fry L.JJ. in *In re Freston*,[9] to which my Lord has referred, if they accurately represent the law, that the privilege from arrest would not attach in this case. The committal order was quite plainly disciplinary in its effect, and, further, on the judgment of Fry L.J., the appellant could not as of right obtain his release by performing his obligations under the order. In fact he could not perform his precise obligations under the order because the time has gone by, but, at all events, on the principle to which Fry L.J. referred, the appellant would not be entitled to claim privilege from arrest on which he relied. It is not necessary to express a decided view about it, for the reason that, assuming that this privilege does exist, it is quite clear from the authorities to which the Divisional Court referred, and, in particular, *Cameron* v. *Lightfoot*,[10] to which my Lord has referred, that the privilege, if any, is not the privilege of the litigant, but the privilege of the court, and if it be the privilege of the court, nothing could be plainer than that it is open to the court itself to have a man arrested if it thinks proper to do so under a committal order, even though he be in that court.

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[9] 11 Q.B.D. 545.

With regard to the other matters on which Mr. Hunt has relied before us, I think it is true to say that every one of them was mentioned either directly or indirectly—although one or two may not have been argued specifically—before this court when the appeal was heard last November, and whether or not the decision of the court on that appeal renders the matter res judicata, which it is not necessary to decide, there is no reason at all to depart now from the conclusions which this court entertained and expressed on that occasion.

Finally, I only want to make one point clear beyond all shadow of doubt. The appellant, both yesterday and the day before yesterday, made observations more than once from which anybody who heard them and was unacquainted with the history of this case might assume that he is in prison for life for non-payment of a debt. Neither limb of that proposition is true. He has not been committed for not paying a debt, but for wilful disobedience of an order of the High Court. As to the suggestion that he is imprisoned for life, I would desire to say that he could pave the way towards securing his freedom at any time by giving an assurance to the judge who made the order for his committal that he will now, though belatedly, obey the order which so far he has refused to obey and carrying that assurance into effect.

I agree that the appeal fails.

PEARCE L.J. I agree. The appellant has put forward many points with great ingenuity, but none of them throws any doubt on the validity of the committal order. These arguments have already been considered and rejected by this court on the appeal from the committal order. It may be debatable whether that judgment prevents their being raised de novo, but, at the least, it must carry great weight with us. I, too, agree with the view

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[10] 2 Wm.Bl. 1190.

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Pearce L.J.

on this point expressed by the Lord Chief Justice. Even on the hypothesis that the whole matter can be considered de novo, I agree entirely with the views that were expressed by this court on the hearing of the former appeal.

The appellant relies, however, on the further ground, which was not before this court on the former appeal, namely, that his arrest was wrongful. He claims a privilege from arrest as the personal prerogative of the litigant or witness, but I am satisfied that that privilege is the privilege of the court and did not prevent the court from properly ordering the appellant's arrest. It would, indeed, be strange if the court were powerless to enforce its committal order while the litigant was in its precincts, and if it had to wait until he had returned home before arresting him. I see nothing in the cases to justify such a proposition.

The appellant's argument has proceeded on the hypothesis that he was at the material time in the class of persons to whom the court accords its privilege of freedom from arrest. But the words of two of the judgments in *In re Freston*,[11] to which my Lord has already referred, throw some doubt on that hypothesis. Wynn-Parry J. found that the appellant was guilty of wilful disobedience to the order of the court. The committal was a punishment for that disobedience and not merely, as the appellant asserts, an inducement to him to comply with the order, and he could not by complying with the order claim to be released at once ex debito justitiae. It is, therefore, at least arguable that the appellant was not at the time of the arrest in the class of persons to whom the court extends its privilege of freedom from arrest, but it is unnecessary to decide that point.

For those reasons, and the reasons which have been given more fully by my Lords, I agree that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Treasury Solicitor; A. Kramer & Co.*

F. R. D

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[11] 11 Q.B.D. 545.

ROSS *v.* EVANS.

1959
April 17.

Lord Parker C.J., Donovan and Salmon JJ.

Animal—Dog—Unmuzzled and ferocious—Greyhounds being exercised on highway on leads—Whether "at large"—Metropolitan Police Act, 1839 (2 *&* 3 *Vict. c.* 47), *s.* 54 (2).

The defendant was charged with two offences under section 54 (2) of the Metropolitan Police Act, 1839,[1] by suffering an unmuzzled ferocious dog to be at large in a public thoroughfare on two occasions. The justices found that the defendant on the occasions in question was exercising a number of greyhounds in a public street. The dogs were on leads but on each occasion one of them, which the defendant made no effort to control, jumped up and bit a passer-by. They held that on each occasion the offending dog, although on a lead, was "at large" within the meaning of section 54 (2) and, accordingly, found both offences proved. On appeal against conviction:—

Held, that section 54 (2) was aimed at the case where the person in charge of a dog had no physical control over it at all, and no offence was committed under the section where the person in charge had the physical means of controlling the dog, such as a lead, but failed to do so. The offending dog was not "at large" on either occasion within the meaning of section 54 (2), and the appeal must be allowed.

Semble, there may be a case where a dog is on a lead so long that the control over it is so minimal that it is to all intents and purposes a dog "at large."

CASE STATED by Gore (Middlesex) justices, sitting at Harrow.

On June 20, 1958, two informations were preferred by the prosecutor, police constable Alun Evans, against the defendant, Victor Ross, alleging (1) that on February 16, 1958, at Chapel Hill, Harrow Weald, Middlesex, and (2) on March 14, 1958, at Brookshill, Harrow Weald, he suffered to be at large an unmuzzled, ferocious dog, in each case contrary to section 54 (2) of the Metropolitan Police Act, 1839.

The justices heard the informations on November 4, 1958, and found the following facts: On February 16, 1958, the defendant was walking in Chapel Hill, Harrow Weald, with six or seven greyhounds on a master lead with small leads from it. One of the greyhounds sprang up on one Ronald Thomas Mortimer who was also walking in Chapel Hill, made a small bite on his left arm and tore his coat. On March 14, 1958, the defendant was walking in Brookshill, Harrow Weald, with five or six greyhounds. They were all on leads. He did not try to control a dog, which leapt up and bit one May Mahoney, who was also walking in Brookshill, on her left arm, tearing her coat and causing a wound necessitating hospital treatment including a skin grafting operation and leaving a scar.

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[1] Metropolitan Police Act, 1839, s. 54: "Every person shall be liable "to a penalty not more than 40s., "who, within the limits of the metro- "politan police district, shall, in any "thoroughfare or public place, com- "mit any of the following offences; ". . . (2) Every person who shall "turn loose any horse or cattle, or "suffer to be at large any unmuzzled "ferocious dog, or set on or urge any "dog or other animal to attack, "worry, or put in fear any person, "horse, or other animal: . . . "

It was contended by the defendant that there was no case to answer.

It was contended by the prosecutor that the offences had been proved.

The justices were of the opinion that a dog being on a lead and in the circumstances proved was a dog " at large " within the meaning of section 54 (2). They accordingly found the defendant guilty on both summonses and imposed a fine of 40s. on each, ordering the defendant to pay £33 14s. for costs on the first summons. The defendant appealed.

Stephen Stewart for the defendant. The point is a brief one —whether a dog on a lead is " at large " within the meaning of section 54 (2) of the Metropolitan Police Act, 1839. Having found that on both the occasions complained of the dog which jumped up and bit a passer-by was on a lead, the justices were wrong in holding that the offending dog was at large.

[Donovan J. If a dog is on a 50-yard lead so that the person in charge has no effective control over it, is it not at large?]

That may be so, but on the findings of the justices this was not such a case. The justices must have read the words " at " large " in section 54 (2) as if they were " not under effective " control," but this is a penal statute which must be construed strictly. If the legislature had meant an offence to be committed where a dog is not under effective control, those words would have been used. [Reference was made to section 54 (4).] " At " large " means roaming about. A dog on a lead is not roaming about and cannot therefore be " at large." There is no authority on this point, but assistance can be derived from the surrounding words of the section, which create offences in relation to horses and cattle. In both cases the words used in relation thereto are " turned loose." Section 61, which gives the police power to destroy mad dogs, uses the words " at large." In using the words " at large " in relation to dogs, what the draftsman had in mind was the case where the owner or person in charge of a dog allows it to escape from the place where it is kept and run into the street. That is not this case and the appeal should be allowed. [Reference was made to the Town Police Clauses Act, 1847, s. 24.]

Henry Pownall for the prosecutor. If the legislature had meant that to be " at large " within the meaning of section 54 (2) a dog must be loose it would have said so, but two different expressions have been used in the subsection, namely, " turn loose " in the case of horses and cattle and " suffer to be at large " in the case of an unmuzzled ferocious dog. Whether a dog on a lead is at large or not is a question of degree. It would be absurd to say that a dog is not " at large " if it is on a lead 50 yards long, so that the question becomes one of fact for the justices. Here they found that on one occasion there were six dogs each on separate leads all at the end of a master lead. It is submitted that what went on at the end of the master lead when one of the dogs leapt up and bit a passer-by makes that dog at large. Admittedly there is no authority as to the meaning of " at large," but it is plain from authority that whether a dog is out of control or not is a question of fact for the justices: *Ex parte Hay*, *per* Manisty J.[2] The appeal should be dismissed.

Stewart was not called on to reply.

Lord Parker C.J. This is an appeal by way of case stated by justices for the petty sessional division of Gore, sitting at Harrow Magistrates' Court, before whom the defendant was charged with two offences contrary to section 54 (2) of the Metropolitan Police Act, 1839, in that he suffered to be at large an unmuzzled ferocious dog. The justices found the offences proved and imposed a fine of 40s. on each summons and ordered the defendant to pay costs. [His Lordship stated the facts and continued:] The sole question, a short one and a novel one, is whether in each of these cases the dog concerned was at large within the meaning of the Act. The Act concerned, the Metropolitan Police Act, 1839, is " An Act for further improving the " police in and near the Metropolis," and by section 54 there are set out a number of acts which are described as " prohibition " of nuisances by persons in the thoroughfares." Subsection (2) provides: " Every person who shall turn loose any horse or cattle, " or suffer to be at large any unmuzzled ferocious dog, or set on " or urge any dog or other animal to attack, worry, or put in

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[2] (1886) 3 T.L.R. 24, 25.

"fear any person, horse, or other animal," shall be liable to a penalty.

The justices in this case clearly, I think, came to the conclusion that although a person might have control of a dog by some physical means such as a lead, yet if he did not control the dog, the dog was at large. They say, with regard it is true to only one of the offences charged, but I understand the facts were the same in each case, that the dogs were all on leads, and "the defendant did not try to control the dog," that is, the dog that jumped up and bit the passer-by. For my part I am quite satisfied that an offence is not committed under the section where a person has the physical means of controlling the dog but does not do so. I think that the section is aimed at the case where a person has no physical control of the dog at all. The case was put in argument of a person who had a dog on a lead so long that he could not exercise any physical control. That is certainly not this case, and it may well be that in such a case it could be said that the control was so minimal that the dog was to all intents and purposes a dog at large. However, that is not this case. This is a case where a man could exercise control over the dog by means of the lead but did not do so. In my judgment, the justices were wrong in convicting the defendant on these two charges, and the appeal must be allowed.

Donovan J. I should be glad, if I could, to take the same view as the justices did of the meaning of the expression "suffer "to be at large any unmuzzled ferocious dog" where it occurs in section 54 (2) of the Metropolitan Police Act, 1839. One has little sympathy with anyone exercising six or seven greyhounds on the public highway controlled only by a lead of such a design that the dog cannot, it seems, be effectively prevented from biting passers-by. But the question here is purely one of construction of the section. The prosecutor relies upon the expression "turn loose any horse or cattle" in the same subsection as contrasted with the words "suffer to be at large" used in relation to a dog, and he says that this shows that the legislature contemplated that a dog could be at large although not turned loose. The expression "to turn loose," however, is one commonly used to describe horses or cattle which are set free; but where dogs are concerned the same idea is commonly expressed by the term "suffer to be at large." Of more weight, I think, is the inference to be drawn from section 54 (4) which reads:

"Every person having the care of any cart or carriage who "shall ride on any part thereof, on the shafts, or on any horse "or other animal drawing the same, without having and holding "the reins, or who shall be at such a distance from such cart "or carriage as not to have the complete control over every "horse or other animal drawing the same." If the legislature intended section 54 (2) to apply to a dog on a lead giving less than complete control over it, I think similar language would have been used. My Lord has said that it may be that if a dog were on a lead which was so extravagantly long that it was for practical purposes just as free to be a nuisance on the highway as if it were loose, it could be said to be "at large" within the meaning of the subsection. There is no evidence of that here. All that the court knows is that in the first episode there was a master lead with small leads from it, and in the second that all the dogs were on leads and the defendant did not try to control the offending dog. That implies that he could have controlled it and that the lead was of such a kind that would have enabled him to do so. Accordingly, when the prosecutor urges that this is a question of fact, I think the answer must be that there was no evidence to justify the conclusion that the leads were so extravagantly long or so hopelessly inadequate as to leave the dog for the purposes of being a nuisance practically at large. That being the case, I do not feel it possible to say that a dog on a lead or leads such as are described in the case is "at large" within the meaning of section 54 (2), and I agree, therefore, that the appeal must be allowed. I hope there is some by-law which can be invoked in this district to stop a repetition of these incidents.

Salmon J. I agree.

Appeal allowed.

Solicitors: *Darracotts; Solicitor, Metropolitan Police.*

E. M. W.

1959
April 30.

Lord Parker C.J., Donovan and Salmon JJ.

PENDER AND OTHERS *v.* SMITH.

Licensing—Licensed premises—Intoxicating liquor taken from premises—"Take from"—Crate of liquor deposited on floor in entrance hall of licensed premises—Intention to remove crate into highway—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 100 (1) (*b*).

By the Licensing Act, 1953, s. 100: "(1) . . . no person shall, "except during the permitted hours . . . (*b*) . . . take from, any "[licensed] premises any intoxicating liquor."

During the permitted hours the defendants bought a crate of beer in the off-licence portion of licensed premises and took it into the smoke-room of the premises. After the close of the permitted hours they were carrying the crate from the smoke-room into the entrance hall of the licensed premises when police officers intervened and caused them to deposit it on the floor of the hall. It had been their intention to remove the crate from the licensed premises into the highway and they would have done so if the police officers had not intervened. The defendants were convicted upon informations alleging that, outside the permitted hours, they did take from the licensed premises intoxicating liquor contrary to section 100 of the Licensing Act, 1953. On appeal:—

Held, that the words "take from" in section 100 (1) (*b*) of the Licensing Act, 1953, connoted a completed act, and that there could be no offence in that respect until the intoxicating liquor was in fact outside the licensed premises; accordingly the defendants were not guilty of the offence charged.

CASE STATED by the judge of the Liverpool Crown Court sitting as recorder.

The defendants, John Pender, Thomas Pender, Peter Jackson and James Wesley Mawer, appealed to the recorder of Liverpool against their conviction, by the Liverpool stipendiary magistrate, on informations laid by the deputy chief constable of Liverpool alleging that each of them, on July 5, 1958, at 10.23 p.m., a time not during permitted hours within the meaning of the Licensing Act, 1953, did take from licensed premises, The Bow and Arrow Hotel, Mab Lane, Liverpool, certain intoxicating liquor, namely, beer and stout, contrary to section 100 of the Licensing Act, 1953.[1]

The following were among the facts found by the recorder. On July 5, 1958, the permitted hours within the meaning of the Licensing Act, 1953, ended at 10 p.m. The Bow and Arrow

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[1] Licensing Act, 1953, s. 100: "(1) " . . . no person shall, except during "the permitted hours (*a*) . . . sell or "supply to any person in any licensed "premises . . . any intoxicating "liquor . . . or (*b*) consume in, or "take from, any such premises any "intoxicating liquor."

Hotel, licensed premises within the provisions of the Act of 1953, consisted of substantial premises with the main entrance leading from a forecourt on the northern side, on which side, and on the eastern extremity of the same, was a self-contained portion of the premises set aside for the sale of intoxicating liquor for consumption off the premises and licensed for that purpose. To the left of the main hall, which was part of the licensed premises, and approximately five feet from the main entrance itself, was the smoke-room, entry to which was gained through a doorway two feet nine inches wide, the door having a return spring fitted to it so that it could not remain open without being held open. At some time prior to 10 p.m. on the evening of the day in question the defendants, or some of them, bought in the off-licence portion of the Bow and Arrow Hotel a crate containing two dozen bottles of beer and stout and carried it to the smoke-room. At approximately 10.23 p.m. two of them, Thomas Pender and Peter Jackson, were carrying the crate of beer from the smoke-room into the entrance hall, accompanied by the other two, when two police officers entered the entrance hall, and after the crate of beer had been carried through the doorway into the main entrance hall caused the crate to be deposited on the floor of the hall. It was the intention of each of the four defendants to remove the crate at that time from the premises into the highway and that purpose would have been accomplished by them as a concerted act had not the police intervened.

It was contended for the defendants that to be convicted of the offence with which each of them was charged it had to be proved and found that the crate of beer had been taken from the licensed premises in the sense that it had been physically removed beyond the boundaries of the premises and not merely moved within the boundaries thereof; that it was not an offence in English criminal law to attempt to commit the crime with which they were charged; that if that contention was wrong in law they could not be convicted of an attempt to commit the offence charged on appeal from their conviction by the magistrate; and that, in any event, only Thomas Pender and Peter Jackson could be convicted of the offence charged and that the other two defendants could not so be convicted.

It was contended for the prosecutor that the defendants were acting in concert in taking the crate of beer from the licensed premises and that those who were not actually and physically carrying it were present aiding, abetting, counselling and procuring the commission of an offence by those actually and physically carrying the crate; that the words "take from" in section 100 of the Licensing Act, 1953, which were contrasted with "consume in," referred to a present act of taking and did not require that act to have been completed by the removal of the intoxicating liquor from the licensed premises to the exterior thereof; that the offence with which the defendants were charged was a misdemeanour and that on the facts it was open to the magistrate's court to convict them of an attempt to commit the offence as an alternative to a conviction of committing the offence charged; and that if the judge of the Crown Court was not satisfied that the offence as charged had been committed it was open to him to vary the decision of the magistrate's court by convicting of an attempt to commit the offence charged.

The recorder came to the conclusion and found (1) that the defendants were acting in concert; (2) that the first contention of the defendants was wrong in law and that it was sufficient for a conviction of each of them of the offence with which each was charged for it to be proved and found that the crate of beer was being moved from within the boundaries of the licensed premises after the close of the permitted hours by the defendants acting together, it being their intention to carry the crate at that time from within the licensed premises and beyond the boundaries of the same; and (3) that there was a criminal offence of attempting to commit the offence charged and that, if he were wrong in his first finding, the defendants were each guilty of that offence and could be convicted of that offence although not charged therewith. He accordingly dismissed the appeals.

The defendants appealed.

At the hearing of the appeal it was conceded, on behalf of the prosecutor, that in the circumstances there was no jurisdiction to convict of an attempt to commit the offence charged.

Andrew Rankin for the defendants. The recorder relied on the definition of "Take" in the Shorter Oxford English Dictionary, vol. 2, p. 2124, IX: "Senses denoting movement "or removal, and related senses. 1.a. To carry, convey; to con- "duct, lead, escort . . . b. To carry or bear (a thing) with one; "to carry to some place or person . . . 2. With *from, off* (hence "sometimes *simply*): To carry away, to remove; to extract; to "deprive or rid a person or thing of . . ." and treated the word as used in section 100 of the Act of 1953 as meaning "to carry." But it is submitted that a mere asportation is not enough to constitute an offence under the section, and that, on the clear meaning of the words used, the offence is not committed unless the intoxicating liquor is taken to some place outside the licensed premises. All that occurred here was an asportation inside the premises.

G. W. Guthrie Jones for the prosecutor. There was here no mere asportation within the premises; the intention of the defendants was to take the crate of beer out of the licensed premises, and there was therefore a continuing act which began in the smoke-room when the defendants started to carry the crate. Section 100 does not use the words "take outside" but "take "from" and makes no contrast between inside and outside the premises. The use of the word "from" is apt to cover a continuing act, and it is submitted that taking "from" begins as soon as there is any asportation of intoxicating liquor and continues until the liquor has been taken to a reasonable distance. By analogy, if a person borrowing a book from a library removes it from a shelf, he is taking the book from the library even though he has not taken it through the door. If a thief moves an object in the pocket of the owner, but does not succeed in taking it away, it has been held that that is insufficient asportation to constitute the offence of larceny from the person, but that is because the thief did not get exclusive possession of the object. Here the defendants had both possession and ownership of the crate of beer before they began to move it, and when they began to move it they began to "take" it "from" the licensed premises and the offence was committed.

Rankin, for the defendants, was not called upon to reply.

LORD PARKER C.J. This is an appeal by way of case stated by the judge of the Crown Court at Liverpool sitting as recorder of that city, before whom the defendants appealed against their conviction by the stipendiary magistrate of Liverpool of an offence against section 100 of the Licensing Act, 1953. The recorder dismissed the appeal, holding that the offence was proved. Section 100 provides, so far as it is material here, that no person shall, except during the permitted hours, "take from any such premises" —that is licensed premises—"any intoxicating liquor."

The short facts are these: the four defendants bought a crate of beer from the off-licence portion of the Bow and Arrow Hotel, Mab Lane, Liverpool. They did not remove it at once, but took it into the smoke-room of the hotel where they were going to continue drinking on the premises. They were minded ultimately to take the crate away and continue drinking somewhere else. At 10.23 p.m., licensing hours having ended at 10 p.m., they began to remove the crate, and they were in the process of taking it out of the smoke-room and into the entrance hall when two police officers entered.

The very short question in this case is whether in those circumstances the defendants can be said to have taken the crate "from any such premises," namely, the hotel. For my part I do not propose to look at any dictionary or even to consider the various examples of the use of the words "take from," whether it be larceny from the person or taking a book out of a room or any such matters. It seems to me to be perfectly clear from the words used in the section that no offence is committed until the intoxicating liquor is taken from and gets outside the licensed premises. Accordingly, in my judgment, the police struck too soon and no substantive offence under the section was committed.

I should add that the recorder stated that if he were wrong in holding that the offence had been committed, he was satisfied, as indeed is clear, that there had been an attempt to commit the statutory offence and that he would be prepared to find the defendants guilty of that offence. That alternative has not been pursued in this court, if only for the reason that before the stipendiary magistrate the defendants were charged with the substantive offence and not with an attempt to commit an offence. There being no jurisdiction in the magistrate to convict of an alternative offence, namely, of an attempt, even if that were possible, the matter cannot arise here. In my judgment this appeal must be allowed.

DONOVAN J. I agree. Mr. Guthrie Jones, whose task, if I may say so, excites my sympathy, has had to ask us to read "take from" in section 100 as being equivalent to "found in "the process of taking from." One cannot read a penal section in that way. The words in section 100, in their ordinary and natural meaning, refer to a completed act and to nothing else.

SALMON J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *John Hands & Son for John O. Cowper, Liverpool; Cree, Godfrey & Wood for T. Alker, Town Clerk, Liverpool.*

J. F. L.

REGINA *v.* ARUNDEL JUSTICES.
Ex parte JACKSON.

1959
April 29.

Lord Parker C.J., Donovan and Salmon JJ.

Crown Practice — Certiorari — Jurisdiction of inferior tribunal — Justices acting in excess of jurisdiction—Disqualification from holding or obtaining driving licence—Period of disqualification in excess of maximum permitted by statute—Whether conviction must be quashed—Whether disqualification severable from conviction and sentence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12.

Road Traffic—Disqualification—Whether severable from conviction—Certiorari—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 12.

The defendant was convicted by justices of driving a motor-vehicle on a road without due care and attention, contrary to section 12 of the Road Traffic Act, 1930, and was fined £20 and disqualified from holding or obtaining a driving licence for a period of 12 months. In fact it was the defendant's first conviction so that under section 12 (2) of the Act he was not liable to be disqualified for a longer period than one month. On an application by the defendant for an order of certiorari to quash the order of the justices adjudging him guilty and sentencing him, on the ground that it was made in excess of their jurisdiction:—

Held that, although the justices had exceeded their jurisdiction in disqualifying the defendant for a period of 12 months, the disqualification was supplemental to and severable from the conviction and sentence, and that, accordingly, the conviction should not be quashed but an order of certiorari would be made and only that part of the justices' order which provided for the disqualification quashed.

Rex v. *Willesden Justices, Ex parte Utley* [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838 distinguished.

Application for certiorari.

The applicant, Martin Burton Jackson, appeared before West Sussex justices sitting at Arundel on a charge of driving a motor-vehicle on a road without due care and attention, contrary to section 12 of the Road Traffic Act, 1930, and pleaded not guilty to the charge. The justices convicted the applicant, and they imposed a fine of £20, disqualified him from holding or obtaining a driving licence for a period of 12 months and ordered that he pay certain costs.

The applicant, as he had informed the justices, had no previous convictions of any kind so that under section 12 (2) of the Act of 1930 [1] he was not liable to be disqualified for a longer period than one month, and he sought an order of certiorari to bring up and quash the order of the justices adjudging him guilty and sentencing him, on the ground that it was bad in law and was made without or in excess of jurisdiction.

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[1] Road Traffic Act, 1930, s. 12 (as amended by the Road Traffic Act, 1934, s. 5 (2), and the Road Traffic Act, 1956, Schs. 8 and 9): " (1) If " any person drives a motor vehicle " on a road without due care and

J. Raymond Phillips for the applicant. A conviction and sentence are not severable and, where the sentence imposed is not authorised by law for the offence of which a defendant is convicted, the whole of the conviction is bad and will be quashed by this court: *Rex* v. *Willesden Justices, Ex parte Utley.*[2] It appears, however, that in two cases noted in the Justice of the Peace Journal, vol. 117, pp. 177, 178,[3] this court treated a disqualification from holding or obtaining a driving licence as severable from the conviction. Those decisions seem to be based on a deduction drawn from section 6 (2) of the Road Traffic Act, 1930, which gives a right of appeal against a disqualification as if it were a conviction. But since those decisions the Road Traffic Act, 1956, was passed, section 28 of which, a new section, gives a person disqualified by virtue of a conviction under the Act a right of "appeal against the disqualification in the same "manner as against a conviction." The marginal note to that section, "Appeal against finding of no special reasons for not "disqualifying," is of interest. The two sections, section 6 (2) of the Act of 1930 and section 28 of the Act of 1956, together provide a right of appeal against disqualification whether it is imposed by a separate order as a matter of discretion or whether it is imposed automatically as a result of a conviction, e.g., under section 15 of the Act of 1930. It is submitted that the purpose of the sections was to give a defendant who wished to appeal against a disqualification only, and not against the conviction or a monetary penalty, the right to do so. But if the disqualification is in reality a thing separate and apart from the conviction and sentence, there would in any event have been a right of appeal against the disqualification and those provisions would be unnecessary. [Reference was also made to *Reg.* v. *Shoreham-by-Sea Justices, Ex parte Pursey.*[4]] In *Rex* v. *Willesden Justices, Ex parte Utley,*[5] where the sentence was excessive, the court held

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"attention . . . he shall be guilty of "an offence. (2) A first conviction "for an offence under this section "shall not render the offender liable "to be disqualified for a longer period "than one month."

[2] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.

[3] (1953) *Reg.* v. *Droxford Justices, Ex parte Hale*, and *Reg.* v. *Abergavenny Justices, Ex parte Murdoch.*

[4] [1955] Crim.L.R. 383.

[5] [1948] 1 K.B. 397.

that there was no power to amend the conviction by substituting another sentence; if a sentence is not severable, there is no reason why a disqualification should be held to be severable. On general principles the court should quash the whole of these proceedings. If that is wrong, then the court is asked to quash the disqualification.

Anthony Harmsworth, for the prosecutor, agreed that that part of the justices' order relating to the disqualification should be quashed, and was not called upon to argue further.

LORD PARKER C.J. In this case Mr. Phillips moves for an order of certiorari directed to the justices of Arundel to quash a conviction whereby they adjudged the applicant to be guilty of driving a certain motor-vehicle on a certain road without due care and attention contrary to section 12 of the Road Traffic Act, 1930, fined him £20, disqualified him from holding or obtaining a driving licence for 12 months and ordered him to pay witnesses' expenses of £4 2s. 6d.

The grounds of the application are that in making that order the justices exceeded their jurisdiction in that by section 12 (2) of the Road Traffic Act, 1930, as amended by the Acts of 1934 and 1956, the maximum period of disqualification in the case of a first offence, as this was, is one month. That is undoubtedly true. The justices did exceed their jurisdiction, and the sole question is whether the court must therefore quash the whole of the order—conviction and sentence—or whether the disqualification is supplemental to the conviction, severable from it, so that the court need only quash the disqualification. It is perfectly clear that, to take this case, the fine of £20 and the conviction are not severable and if the fine of £20 had been in excess of the justices' jurisdiction, then the whole order, including the conviction, would have to be quashed. That is the effect of *Rex* v. *Willesden Justices, Ex parte Utley.*[1]

In this case, however, the disqualification in question is really supplementary to the rest of the order and, without going into the reasons therefor, I need only say that the matter has been twice before this court, and in both cases this court has decided that that is the proper view and the court need only quash the disqualification. The cases are not fully reported, but they appear sufficiently from the Justice of the Peace Journal,[2] vol. 117, at p. 177. In one of those cases Lord Goddard C.J. is reported to have said[3]: "The court therefore quashes the "order of disqualification. We do not quash the conviction or "the penalty because section 6 (2) of the Road Traffic Act, 1930, "points out that the order for disqualification is different from "the conviction, and it expressly gives power to a disqualified "person to appeal against the order of disqualification as if it "were a conviction. That shows that it is something separate, "and it is perfectly easy to sever that part of the order which "deals with disqualification from that part of the justices' adjudication which deals with the penalty. We cannot, in quashing "the order for disqualification, substitute the right period, but "there is no reason why we should quash that part of the order "which deals with the penalty."

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[1] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.

[2] (1953) *Reg.* v. *Droxford Justices, Ex parte Hale*, and *Reg.* v. *Abergavenny Justices, Ex parte Murdoch.*

Accordingly, in my judgment, an order of certiorari must go and that part of the order which provides for a disqualification of 12 months must be quashed.

DONOVAN J. I agree.

SALMON J. I agree.

Order of certiorari accordingly.

Solicitors: *Chalton Hubbard & Co. for Malcolm, Wilson & Cobby, Worthing; T. C. Hayward, Chichester.*

J. F. L.

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[3] 117 J.P.N. 177, 178.

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EASTBOURNE CORPORATION v. FORTES ICE CREAM PARLOUR (1955) LTD.

Town and Country Planning—Enforcement notice—Justices' jurisdiction—Question whether development occurred—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 12, 23 (2) (4).

In or about June, 1956, a company placed an automatic coin-operated ice-cream sales machine on the forecourt outside its premises, which it used as an ice-cream parlour. There were holes in the base of the machine whereby it could be bolted to the ground when in use; the refrigeration plant in the machine was operated by electricity supplied through a cable. No planning permission was sought or obtained for the machine and by an enforcement

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notice dated May 16, 1957, served by the local planning authority, the company was required to remove the machine. The company appealed to the justices against the notice under section 23 (4) of the Town and Country Planning Act, 1947.[1]

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[1] Town and Country Planning Act, 1947, s. 12: " (1) Subject to the " provisions of this section and to " the following provisions of this Act, " permission shall be required under " this Part of this Act in respect of " any development of land which is " carried out after the appointed day " [July 1, 1948].

" (2) In this Act, except where " the context otherwise requires, the " expression 'development' means " the carrying out of building, en" gineering, mining or other opera" tions in, on, over or under land, " or the making of any material " change in the use of any buildings " or other land:

" Provided that the following " operations or uses of land shall not " be deemed for the purposes of this " Act to involve development of the " land, that is to say:—(*a*) the " carrying out of works for the main" tenance, improvement or other " alteration of any building, being " works which affect only the interior " of the building or which do not " materially affect the external ap" pearance of the building; . . .

" (3) For the avoidance of doubt it " is hereby declared that for the pur" poses of this section (*a*) the use as " two or more separate dwelling" houses of any building previously " used as a single dwelling-house " involves a material change in the " use of the building . . . ; (*b*) the " deposit of refuse or waste materials " on land involves a material change " in the use thereof. . . .

" (5) Notwithstanding anything in " this section, permission shall not " be required under this Part of this " Act—(*a*) in the case of land which, " on the appointed day, is being used " temporarily for a purpose other " than the purpose for which it is " normally used, in respect of the " resumption of the use of the land " for the last-mentioned purpose; " (*b*) in the case of land which, on " the appointed day, is normally used " for one purpose and is also used on " occasions, whether at regular inter" vals or not, for any other purpose, " in respect of the use of the land " for that other purpose on similar " occasions after the appointed day; " (*c*) in the case of land which on " the appointed day is unoccupied, in " respect of the use of the land for " the purpose for which it was last " used: . . ."

S. 17. Applications to determine whether permission [is] required: " (1) If any person who proposes to " carry out any operations on land " or make any change in the use of " land wishes to have it determined " whether the carrying out of those " operations or the making of that " change in the use of the land, would " constitute or involve development " of the land . . . and, if so, whether " an application for permission . . . " is required . . . having regard to " the provisions of the development " order, he may . . . apply to the " local planning authority to deter" mine that question.

" (2) The foregoing provisions of " this Part of this Act shall, sub" ject to any necessary modifications, " apply in relation to any application " under this section and to the deter" mination thereof as they apply in " relation to applications for per" mission to develop land and to the " determination of such applications: " Provided that where it is decided " by the Minister under any of the " said provisions that any operations " or use . . . would constitute de" velopment . . . or that an applica" tion for permission is required . . . " that decision shall not be final for " the purposes of any appeal to the " court under the provisions of this " Part of this Act relating to the " enforcement of planning control, in " relation to those operations or that " use."

S. 23: " (1) If it appears to the

On appeal from a decision by the justices that there had been no development within section 12 (2) of the Act of 1947, the Divisional Court of the Queen's Bench Division (Lord Goddard C.J. dissenting) held that the justices had no jurisdiction under section 23 (4) of the Act to determine whether in fact development within section 12 had taken place. On appeal:—

Held, allowing the appeal, that the powers conferred on the justices by section 23 (4) enabled inquiry to be made into the allegation which had to be made in every enforcement notice that unauthorised development had, in the opinion of the local authority, been carried out. The allegation involved a double inquiry, first whether there had been "development" after July 1, 1948, or at all, and if after that date, whether it was of a kind that required permission under the Act.

East Riding County Council v. *Park Estate (Bridlington) Ltd.* [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669 applied.

Norris v. *Edmonton Corporation* [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801 approved.

Keats v. *London County Council* [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303 overruled.

"local planning authority that any "development of land has been "carried out after the appointed day "without the grant of permission "required in that behalf under this "Part of this Act, or that any con"ditions subject to which such per"mission was granted in respect of "any development have not been "complied with, then, subject to any "directions given by the Minister, "the local planning authority may "within four years of such develop"ment being carried out, if they "consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section.

"(2) Any notice served under this "section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged "to have been carried out without "the grant of such permission as "aforesaid or, as the case may be, "the matters in respect of which it "is alleged that any such conditions "as aforesaid have not been com"plied with, and may require such "steps as may be specified in the "notice to be taken within such "period as may be so specified for "restoring the land to its condition "before the development took place ". . . and in particular may . . . "require . . . the discontinuance of "any use of land. . . .

"(4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may . . . appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(*a*) if satisfied that per"mission was granted under this "Part of this Act for the develop"ment to which the notice relates, "or that no such permission was "required in respect thereof, or, as "the case may be, that the condi"tions subject to which such per"mission was granted have been "complied with, shall quash the "notice to which the appeal relates; "(*b*) if not so satisfied, but satisfied "that the requirements of the notice "exceed what is necessary for re"storing land to its condition before "the development took place . . . "(*c*) in any other case shall dismiss "the appeal: . . ."

Point of Ayr Collieries Ltd. v. *Lloyd-George* [1943] 2 All E.R. 546 distinguished.

Decision of Divisional Court [1958] 2 Q.B. 41; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276 reversed.

APPEAL from Divisional Court.

The following statement of the facts is taken from the case stated by the Eastbourne justices.

On June 13, 1957, a complaint was preferred by the respondents, Fortes Ice Cream Parlour (1955) Ltd., for an order to quash or vary a notice dated May 16, 1957, of the appellants, the Eastbourne Corporation, relating to premises at 247, Terminus Road, Eastbourne, and expressed to be an enforcement notice served pursuant to section 23 of the Town and Country Planning Act, 1947. The notice was in the following terms: " Whereas " an automatic ice-cream sales machine has been affixed to and " installed on the forecourt of the premises known as 247, " Terminus Road, Eastbourne, and whereas the aforementioned " operations constitute development within the meaning of the " above Act and (a) the said operations have been carried out " without the grant of planning permission under Part III of the " said Act; Now therefore the [corporation] do hereby give you " notice in pursuance of their powers as local planning authority " under sections 23 and 24 of the aforementioned Act to:—remove " the said automatic ice-cream sales machine together with the " electric cable attached thereto and further to remove the bolts " and other fittings securing the said machine to the said fore- " court within 21 days after the date on which this notice becomes " effective."

The justices found the following facts: The premises at 247, Terminus Road comprised a shop on the ground floor and basement of a building at the corner of Terminus Road and Burlington Road. They were occupied by the company as an ice-cream parlour and restaurant under a lease held in trust for the company by one Forte, a director thereof. There was a paved forecourt adjoining the public footway of the above roads, and the shop-front facing these roads had a black base, large glass windows displaying food menus and advertisements, and a facia-board at a height of from 12 to 14 feet above the forecourt bearing the words " Fortes Ice Cream Parlour."

In or about June, 1956, the company bought an automatic coin-operated ice-cream sales machine and had it placed on the forecourt in the corner of its premises nearest to the adjoining premises at 245, Terminus Road. The machine was blue and white in colour, was 6 feet 2 inches high, approximately 30 inches square, and weighed approximately 5½ hundredweight. The machine was not attached to the forecourt by bolts or otherwise. The refrigeration plant in the machine was operated by electricity supplied through a cable (housed in a ⅝th in. conduit) which was connected to the mains supply in the aforesaid premises. The conduit, black in colour, came from a grille in the base of the shop-front and was fitted by an electrician from a near-by shop. No planning permission under the Town and Country Planning Act, 1947, was sought or granted on any application relating to the machine. The company's machine was removed on only one occasion, June 24, 1957, when photographs were taken of the premises without the machine, which was thereafter immediately replaced. It took above five minutes to disconnect the electricity cable and remove the machine. By fitting a "niphan" switch the time taken to disconnect the cable could be considerably shortened.

The company contended that the justices were not bound to assume that the matters alleged in the enforcement notice had occurred or, insofar as they had occurred, that they constituted development, but could determine whether or not any operations amounting to development had occurred; that neither what was alleged in the notice, nor what in fact had occurred, amounted to the carrying out of development within section 12 of the Act of 1947, and accordingly the justices might be satisfied that no permission was required in respect thereof.

Alternatively, the company contended that any operations carried out did not involve development by reason of proviso (*a*) to section 12 (2) of the Act of 1947, and it was further contended that the requirements of the enforcement notice (except in so far as they were incapable of performance) had been satisfied (before the beginning of the period allowed for this purpose) on June 24, 1957; that in any event the form of notice used in this case was inappropriate. The company conceded that placing a machine on land might in some cases involve a material change of use, but not in this case.

The corporation contended that the installation of the machine constituted development within section 12 (2) of the Act of 1947, and as such required planning permission under section 12 (1) of the Act.

The justices were of the opinion that it was open to them to determine whether the matters alleged as constituting development had in fact occured and whether, if so, they constituted development within section 12 (2) of the Act of 1947; in this case there had been no such development. They therefore quashed the notice.

The corporation appealed. The Divisional Court held (Lord Goddard C.J. dissenting) that the justices had no jurisdiction under section 23 (4) of the Act of 1947 to determine whether in fact development within section 12 of the Act of 1947 had taken place; they had to assume that it had, and their jurisdiction was limited to ascertaining whether permission had been granted or whether the alleged development fell within the class of development for which permission was not required. The company appealed.

John Pennycuick Q.C. and *J. D. James* for the company. Section 23 (1) is elliptical. It must appear to the planning authority, first, that certain work has been carried out; secondly, that that work constitutes "development" as defined, and, thirdly, that no permission was granted. In subsection (4) (*a*) the "development to which the notice relates" refers back to subsection (2), that is, the development alleged to have been carried out as specified in the enforcement notice. The word has the same meaning as in subsection (2), and "no such permis- "sion" on its natural construction is applicable to works not constituting "development" within section 12, just as much as to works which are development but which do not require permission. The exegesis of the section put by Mr. Megarry in *Guildford Rural District Council* v. *Fortescue* [2] is adopted on this point. The corporation submit that subsection (4) (*a*) refers to "development which is alleged to be development and which the "justices must assume constitutes development," but if Parliament had intended that meaning, it is submitted that it would have provided expressly that the courts were bound to assume that the works constituted "development for this Part of the "Act" and that these words cannot be written in. The natural construction of section 23 harmonises with the proviso to section 17, which on the other construction is deprived of meaning. Another anomaly would be section 75 (5). The court will not lean towards a construction which is repugnant with other provisions.

In *East Riding County Council* v. *Park Estate (Bridlington) Ltd.*[3] the magistrates found that the change of use in question had taken place before the appointed day under the Act of 1947 and, as permission was not needed, they quashed the notice. The majority of the House of Lords held that the justices had acted within their jurisdiction. The House was not concerned with works or use which from their nature, as distinct from the date on which they had been carried out, did not constitute "development," but general statements were made which are applicable equally to both types. In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[4] the *East Riding* case[5] was not apparently referred to, but Lord Denning[6] in terms contemplated the service of an enforcement notice and said that a company contending that permission was not required could appeal to quarter sessions asking that the notice should be quashed, and then by way of a case stated could obtain the ruling of the High Court on whether permission was required. In the present case Lord Goddard C.J.'s judgment in the Divisional Court is adopted. Donovan J., it is submitted, paid too little attention to the word "alleged." It is the works or change of use alleged to have been done which is alleged to constitute development. It is wrong to treat "development" as meaning "conclusively assumed development" and to assert that the justices are limited to considering whether permission under section 12 is required in respect of that conclusively assumed "development." Donovan J. suggested[7] that the policy of the Act seemed to be that planning control should be left to the planning authorities and the Minister and that the courts should not be able to override the exercise of their authority. That argument overlooks section 24 under which the courts have jurisdiction to decide whether an act is in breach of planning control. There is no reason why the courts should not equally have the right in proceedings by a landowner to quash an enforcement notice.

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[2] Post, p. 112; [1959] 2 W.L.R. 643.

[3] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

Geoffrey Lawrence Q.C. and *Peter Boydell* for the corporation. It is conceded that the corporation have to show that on a proper construction of section 23 (4) (*a*) the jurisdiction of the magistrates is clearly ousted. It is insufficient to show that the proper construction is not clear for, if the section admits of alternative meanings, the courts will prefer the one which harmonises with the rest of the Act. The jurisdiction of the justices only comes into operation when an enforcement notice has been served under section 23 (4). That is the first hypothetical foundation for the jurisdiction. An enforcement notice under section 23 can only be served if it " appears " to the local authority that development has been carried out without permission. That is the second hypothetical foundation. The words " if it appears " to the planning authority are profoundly significant. They are words which by 1947 in this type of legislation had a well-established meaning, that is, that the decision on appearances, if made in good faith, was not afterwards questionable in any court. In the corresponding provisions of the earlier Acts of 1932 and 1943 it was clear that the justices could inquire into any allegation in the notice, but a significant change was made in the Act of 1947 by introducing " if it appears " as the foundation for the whole code. This is consistent with the policy of the Act and the history of the gradual strengthening of the powers of the local authority and the weakening of those of the individual.

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[4] [1958] 1 Q.B. 554; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.
[5] [1957] A.C. 223.
[6] [1958] 1 Q.B. 554, 566.
[7] [1958] 2 Q.B. 41, 54.

[LORD EVERSHED M.R. Those words are not conclusive, because, if the matter is carried to a prosecution, it is plainly open to the landowner to challenge the fact that had " appeared " to the planning authority.]

That was conceded in *Francis* v. *Yiewsley and West Drayton Urban District Council*,[8] but that arises on a criminal prosecution and this section deals with enforcement notices. It is submitted that " no such permission was required " should be construed by limiting it to cases where the development was before July 1, 1948, and to those matters which the Act says are " development " but for which permission is not required. The question whether the work done was " development " was not in issue in the *East Riding* case [9]; the issue was when the work, admittedly " development," was carried out. The question of the determination of the date arises necessarily on section 12 (1), which requires permission only in respect of development after the appointed day. Inquiry into the date when the development took place is not outside the limited construction of section 23 (4). [Reference was made to *Robinson* v. *Corporation of Sunderland*.[10]]

It is not submitted that in no circumstances can any court inquire whether development has or has not taken place, but the use of these words in a modern statute of this kind indicates an intention to leave certain administrative acts to the local authority, and the courts ought not to stretch the meaning or import words to widen a closed jurisdiction. One cannot but criticise the leaving of mixed questions of law and fact to the planning authority, but it is characteristic of modern planning legislation.

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[8] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

[9] [1957] A.C. 223.

[10] [1899] 1 Q.B. 751, 754.

[LORD EVERSHED M.R. One of the grounds alleged as not requiring permission is by reference to the last use. If inquiry can be made into that, it is difficult to see why one should not inquire into the case where there is said to have been no development at all.]

The Act is full of incongruities. If a landowner says that he has not done the work at all, he can ignore the notice, and if and when he is prosecuted, he can say that it is a nullity. The onus is, unfortunately, on him to determine whether the notice is one which can be challenged before the justices or not. *Point of Ayr Collieries Ltd.* v. *Lloyd-George* [11] shows that where the local authority are made sole judges of a matter, as they are here, any derogation from that power must be in plain terms.

[ORMEROD L.J. In the *Point of Ayr* case [11] the order was made by the Minister, but section 23 may not go quite as far as that. It merely gives the planning authority power to serve a notice and then certain consequences may or may not follow.]

That is only a difference of degree.

[Reference was made to *Liversidge* v. *Anderson.*[12]] The basis of the enforcement notice is that "development" in the technical sense of section 12 has been carried out without permission. Section 23 cannot be construed apart from an analysis of section 12. There are three separate concepts in that section. First, "development" is defined as comprehensively as possible. Secondly, by the proviso to (2) there are certain factual operations or uses which, although apparently within the ambit of the Act, are for the purposes of that Act to be deemed not to involve "development." Thirdly, by subsection (5) certain matters which are admittedly "development" within the definition are exempted from the necessity for permission. One cannot understand the later sections or the *East Riding* case [13] without keeping these matters distinct. Reading the section as a whole, permission is never required for what is not "development." Section 23 (4) lays down the direction to the justices and the structure of the power, particularising the sole cases in which justices are directed imperatively to quash, and in paragraph (*b*) the sole events in which the justices are directed imperatively to vary. In all other cases they are directed to dismiss the appeal. They have a discretion only in the proviso to subsection (4), where they have power to postpone the operation of an enforcement notice. The events or conditions in which they can quash are, first, if they are satisfied that permission was granted under this Part of this Act for the development " or that no such permission " was required in respect thereof." The appellants' construction of that ignores the word " such," which can only mean permission under this Part of this Act, that is, permission granted in respect of " development " in the technical sense, by reference to section 12 (1), after the appointed day. " In respect thereof " means in respect of the development to which the notice relates. One should approach the construction leaning towards a narrower and restricted construction. The allegation is that " develop-" ment," the fact of the carrying out of which is not open to challenge, has been carried out without permission. Section 75 (1) confines the limitation on section 23 to works not merely existing but existing in contravention of planning control. What the justices have to determine in that case is not whether the works cited are " development " but whether, assuming that they existed, they are within the ambit of section 75. The enforcement notice has to make it clear whether the development complained of occurred before or after the appointed day. Even under section 75 it is assumed that the notice is in proper form to determine the question.

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[11] [1943] 2 All E.R. 546.

[12] [1942] A.C. 206; [1941] 3 All E.R. 338.

[13] [1957] A.C. 223.

[SELLERS L.J. Suppose permission is produced. Cannot the justices consider whether the nature of the work is or is not within the permission?]

They can consider that.

[SELLERS L.J. And then suppose that they conclude that the work is not within the permission.]

They have to see what the work is, but they have to look at it in the terms of the notice. They have to assume that the facts alleged constitute " development." In the *East Riding* case [14] the House of Lords accepted that the jurisdiction of the justices was strictly limited in some way, but if the justices are entitled to challenge the recital on which the enforcement notice is based, it is difficult to see that their jurisdiction is limited at all.

[LORD EVERSHED M.R. If one has to wait until a prosecution is brought, the local authority may have to face an enormous claim if the building has been demolished and it is ultimately found that they were wrong. Surely it is more likely that Parliament would provide the possibility of going to the justices?]

[14] [1957] A.C. 223.

The *East Riding* case [14] is not authority for giving the justices extended jurisdiction. [Reference was made to *Keats* v. *London County Council.*[15]] The difficulty of the corporation's construction is, of course, the proviso to section 17, but it would be wrong to do violence to the plain meaning of section 23 to accommodate the proviso to an earlier section dealing with an entirely different matter. This must be treated as a case where, per incuriam, there are repugnant provisions in this complicated Act. [Reference was made to *Wood* v. *Riley,*[16] which shows that the last section prevails if there is a conflict, and to *Arnold* v. *Gravesend Corporation.*[17]]

Pennycuick Q.C. in reply. The *Point of Ayr* case [18] does not decide that what " appears " to the authority shall be treated as fact, but that, if it " appears to the authority . . . ," etc., then the authority has a certain power and exercise of that power cannot be challenged. In that case there was no appeal to the court on any question of fact, but under section 23 (4) there is an appeal and the question is what is the proper construction of the subsection giving the power of appeal. In this context " development " is the carrying out of an act which appears to the planning authority to be development within the definition, and is alleged in the notice to be development. The meaning must be the same in subsections (2) and (4), and the words " no " such permission is required " only apply to an act which is not development. The *East Riding* case [19] decided that the justices had jurisdiction to inquire whether or not work was carried out after the appointed day, and, if they can do that, it is impossible to say that they cannot do so in relation to the nature of the work.

Cur. adv. vult.

March 23. LORD EVERSHED M.R. stated the facts and continued: I adopt as a statement of the problems raised by the appeal the language of Lord Goddard C.J.[1]: " The question we " have to determine depends, in my opinion, on the construction " of the words ' if satisfied that permission was granted under " ' this Part of this Act for the development to which the notice " ' relates, or that no such permission was required in respect

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[14] [1957] A.C. 223.
[15] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.
[16] (1867) L.R. 3 C.P. 26.
[17] (1856) 2 K. & J. 574.
[18] [1943] 2 All E.R. 546.
[19] [1957] A.C. 223.
[1] [1958] 2 Q.B. 41, 49; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

"'thereof.' Is the court to assume that there has been development and to confine themselves to considering whether it is "development permitted by the Act without permission, or can "they go further and decide that there has not in fact been any "development? I propose in the first place to treat this as a "matter of construction and then to consider what effect, if any, "the cases which have been decided on the section have upon the "conclusion to which I have come."

I propose, accordingly, for my part also to deal with the problems raised as he did and as, indeed, they were presented to us by counsel for the appellant company and the corporation: namely, first to consider the matter of construction of the Act, and, secondly, the effect of the cases, and particularly of *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.* in the House of Lords.[2]

First, then, as to the construction of the Act. The vital words in section 23 (4) are those cited by Lord Goddard C.J.—"or that no such permission was required in respect thereof." [His Lordship read the relevant parts of section 12 as set out above and continued:] Mr. Lawrence observed on behalf of the respondents that three conceptions are involved in section 12, namely: (1) that of "development of land," which is closely defined in the section; (2) that of changes of user which are deemed not to constitute development; and (3) that of changes of user which, though constituting development, are excused from requiring permission. Mr. Lawrence drew attention to the distinction between the second and third conceptions. Parliament might, as he pointed out, have treated those changes in user falling within the second conception in the same way as those falling within the third, namely, that they were excused from the requirement of permission. An answer to his point in this respect may be that, by so doing, Parliament would or might have thereby widened the meaning of the word "development." But the distinction is made and was somewhat relied upon, as later appears, by Mr. Lawrence in support of his argument for the corporation.

I turn at once to section 23. [His Lordship read the section as set out above and went on:] As I have already stated, the relevant words in the last subsection that I have read, subsection (4), are "that no such permission was required in respect thereof."

It was conceded by Mr. Lawrence that if his arguments were to prevail the clear meaning of these words *must* exclude the

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[2] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

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relevant inquiry, videlicet, whether the use alleged or complained of constituted development at all. The concession was, in my judgment, necessary; for if upon this matter the construction and scope of the words be doubtful, then Mr. Lawrence would be inevitably faced with the serious difficulty presented to his argument by inconsistency created by other provisions in the Act and most forcibly by the terms of section 17.

Mr. Lawrence's first submission was based on the strict limitation upon the powers of justices which appears from the language of section 23 (4) itself, and particularly the words in paragraph (*c*) "in every other case shall dismiss the appeal." The limitation is indeed plain and has been noted in the cases, including the *East Riding* case [3] itself. With this background of strict limitation of powers, Mr. Lawrence then proceeded to emphasise the word "such" immediately before the word "permission" in the relevant formula. He contended—and in my judgment rightly contended—that the word "such" was a reference back to section 12, so that the phrase, when extended, reads "no permission under this Part of this Act was required" —etc. With this interpretation of the word "such" Mr. Megarry (who argued this point in *Guildford Rural District Council* v. *Fortescue*,[4] our judgment in which follows after this case) was himself in agreement. It follows, according to Mr. Lawrence, that if you do refer back to section 12, then permission is only found to be required for what must be, or must be assumed to be, post-1948 development. Thus, although in this matter Mr. Lawrence may be said to have protected his argument in advance from the effect of the *East Riding* case,[5] it may be open to the justices to inquire whether the "development" was carried out before or after the appointed day. But that, according to Mr. Lawrence's argument, is all that the justices may investigate as regards the existence of the development. In other words, subject to this one question of date, the justices' only function, according to the proper meaning of the language used in the relevant formula, is to inquire whether the development mentioned in the notice is or is not of the "excused" class. Thus will be observed the significance of the distinction emphasised by Mr. Lawrence between the second and third conceptions above mentioned, that is, the conception of user not deemed to be development and user which, though constituting development, is excused from the requirement of permission.

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[3] [1957] A.C. 223.
[4] Post, p. 112.
[5] [1957] A.C. 223.

Mr. Lawrence sought further support for his contention from the opening formula in section 23 (1), "if it appears to the local "planning authority . . . ," a formula which he claimed to be hallowed by authority as indicating the intention by Parliament that that which so appeared in good faith was unchallengeable in the courts; and he cited by way of illustration the judgments of Lawrance and Channell JJ. in *Robinson* v. *Corporation of Sunderland*[6] and of this court in *Point of Ayr Collieries Ltd.* v. *Lloyd-George*.[7] Finally, Mr. Lawrence drew attention to the contrast between the limited scope of the justices' powers as it appears from the terms of section 23 (4) of the Act of 1947 and the generality of the corresponding powers of the older legislation (see section 13 (4) of the Town and Country Planning Act, 1932, and section 5 (2) and the First Schedule to the Interim Development Act of 1943). The contrast, said he, emphasised that in the later legislation Parliament deliberately circumscribed the powers vested in the magistrates' courts of interference with the planning authorities.

There is plainly great force in these arguments. It is, in my judgment, undeniable that upon a first reading of the relevant words in section 23 (4) the draftsman appears to be directing himself to the question whether the (assumed) development is of a kind for which no permission is required—the conception of "excused development." I do not therefore doubt that the words may fairly, and perhaps more naturally, be construed in this narrow sense. But I have for my part reached a clear conclusion that it is not the necessary and inevitable meaning of the words.

I will first dispose briefly of the two general contentions on the respondents' part last mentioned. There is no doubt that in certain contexts and for certain purposes the words "if it "appears" and similar formulae are intended to exclude challenge where the opinion formed has been arrived at in good faith. But, as Mr. Pennycuick pointed out, in these cases the purpose and effect of the formation of such an opinion was not itself to determine private rights but was the condition precedent for the exercise of some statutory power. Thus, in the *Point of Ayr* case[8] the formation by the Minister of Fuel and Power of the opinion that the interests of public safety or the efficient prosecution of the War or like considerations required it, gave rise to a power on his part to take the necessary steps to assume control of

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[6] [1899] 1 Q.B. 751.

[7] [1943] 2 All E.R. 546.

[8] Ibid.

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a colliery undertaking. Such considerations have no application to the present case, where the relevant question is whether unauthorised development of land has taken place—a question admittedly liable to challenge at some stage, under section 24, if not under section 23. In such a case there would appear to be no natural ground of logic or precedent for giving to three simple English words the effect of prejudging one of the essential matters of fact on which the justification of the owner's actions will depend.

I am also unable to think that the difference in the relevant terminology between the old and the new legislation can really assist in the problem of construction. And I note that, notwithstanding the change in form, the scheme of the older legislation does not differ from that of the new in this, that where the planning authority seek actually to enforce their previous notice, then the owner will not be entitled to rely by way of defence on points that he might have earlier taken by way of appeal to the justices (see section 13 (6) of the Act of 1932).

I return to the vital language of section 23 (4) of the Act of 1947; and, in my judgment, much assistance towards a proper solution is to be found in the last seven words ". . . the development to which the notice relates." For properly expounded by reference to the earlier subsections (1) and (2), these words must, in my view, mean (and I am again indebted to Mr. Megarry in the *Guildford* case [9]) "the development which is alleged to have "been carried out without the grant of permission required in "that behalf under this Part of the Act." In my judgment, it is the use of the word "alleged" derived from subsection (2) that provides the all-important clue. It is, as I think, an essential requirement of the enforcement notice that it should *allege* development carried out without permission; and I can see no compelling reason for holding that the only subject of the "allegation" is the absence of permission, the development itself (that is, the requirement) being assumed. On the contrary, it appears to me more natural to treat the allegation as being, as it were, a double allegation—an allegation both of the development (requiring permission) having been carried out and of the absence of permission; and, if so, that the justices' powers conferred by the formula in question involve inquiry whether no permission under Part III of the Act was required on the ground that there had been in fact no development either after 1948 or at all, no less than on the ground that, though post-1948 development had occurred, it was of a kind that did not require permission.

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[9] Post, p. 112.

If, then, this is a fair and legitimate view of the construction of the subsection, there are (as I have earlier indicated) strong grounds of consistency in the Act as a whole, and of convenience, for its adoption. I refer first to section 75, which makes applicable, subject to the provisions of the section, the enforcement procedure of section 23 to contraventions of pre-1948 planning control. But in such cases there is substituted for the terms of paragraph (*a*) of section 23 (4) the paragraph (*a*) set out in section 75 (5), namely, " if satisfied that the works or use to which the " notice relates are not works or a use to which section 75 of this " Act applies, shall quash the notice to which the appeal relates." In my judgment it is impossible, according to the ordinary sense of this paragraph, to deny to the justices the power of determining whether in fact the use complained of occurred before 1948 or at all; and if this is right there would, according to the respondents' argument, be an incongruity between the justices' powers in the cases of alleged pre-1948 and post-1948 development.

More cogent still, however, are the terms of section 17. This section relates to " Applications to determine whether permission " [is] required." [His Lordship read section 17 as set out above and continued:] It is clear, and was conceded by Mr. Lawrence, that the terms of the proviso to subsection (2), which clearly assume the power which the respondents deny, cannot be reconciled with section 23 (4) if the respondents' contention is well-founded. Faced with this repugnancy, Mr. Lawrence would reject the proviso to section 17 (2) altogether—for no middle course is possible. This was indeed the conclusion of the majority of the Divisional Court. But I am unable to accept the necessity. It is no doubt true, as Donovan J. said, that if two sections of an Act of Parliament are in truth irreconcilable, then prima facie the latter will be preferred: and that the courts will tend against inferring an independent substantive enactment from a mere proviso to another enactment. But these are arguments of the last resort. The first duty of the court must be, if the result is fairly possible, to give effect to the whole expression of the parliamentary intention. In the present case, for reasons already given, I do not think the repugnancy, upon a true analysis, arises.

On the matter of convenience, perhaps I may be allowed, in anticipation of what follows, to cite from my own speech in the *East Riding* case.[10] " But other cases may well arise in which

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[10] [1957] A.C. 223, 252.

"serious questions of fact might be involved, questions whether "in truth the development had been carried out before the "appointed day or whether the land had in fact ever been used "as alleged. If in such cases it were beyond the jurisdiction of "the justices upon an appeal to determine such questions of fact, "then the only course open to the owner would be to await the "taking of further steps by the authority under section 24 of the "Act and then to challenge the validity of the notice; a course "which might well involve him in a long period of uncertainty "and would certainly be likely to expose him to serious expense. "Equally might such a course of proceedings be an embarrass-"ment to the authority, who might find, when the facts had "turned out ultimately against them, that it was then too late to "exercise their statutory powers and duties at all."

I, therefore, upon the question of construction reach the same conclusion as Lord Goddard C.J.; and I am unable, with all respect to them, to agree with the view of the majority of the court as expressed by Donovan J.[11] "I think it is inaccurate to "speak of permission not being required under the Act on the "ground that the particular operation or change of use is not "'development.' For then, as I say, the question does not "arise at all. The phrase is apt only to refer to that which "is development but which the Act exempts from the necessity "for permission."

It is at this point that I have to part company with the learned judge; for in saying that, in the circumstances he supposed, "the "question does not arise at all," he might, as it seems to me, be said to be begging the question which has to be decided.

I add in conclusion upon this part of the case that (particularly having regard to section 17, to which I have already adverted) I can see no sufficient ground for supposing that the competence of the justices to inquire, aye or no, into the fact of development should be regarded as a subject-matter inappropriate for their jurisdiction. Rather, and as a matter of principle, I should prefer the view that clear words must be found to justify an ousting, upon such a matter, of the jurisdiction of the courts.

I turn now to the second question posed at the beginning of this judgment, namely, what effect, if any, the decided cases, and particularly the *East Riding* case,[12] have had upon the question. In the *East Riding* case [12] the questions before the House of Lords included the questions whether the enforcement notice there in suit ought to be taken as alleging a post-1948 development

[11] [1958] 2 Q.B. 41, 52.

[12] [1957] A.C. 223.

and, if so, whether the justices had power to quash it, the alleged development being admitted or found to have been pre-1948. These questions were answered affirmatively by the majority of the House. It will, however, be observed that the second of these two questions was not the precise question now before us. The problem in the *East Riding* case,[12] so far as it concerned development, was confined to date—a problem which Mr. Lawrence conceded might be regarded as open to inquiry by the justices, having regard to the reference to the appointed day in section 12 (1) of the Act. The problem whether it is competent for the justices to investigate the question whether what has been done amounts to development at all within the meaning of the Act was not expressly decided, and indeed may be said to have been deliberately left undecided by the last paragraph of my own speech.

Nevertheless, I agree with Lord Goddard C.J. that the reasoning which underlay the decision of the majority of the House applies to, and covers, the present question. Viscount Simonds, in his leading speech, said[13]: "I do not dissent from the "conclusion to which the Divisional Court came, and I think "that, in the earlier part of the passage that I have cited, the "view is clearly expressed that, upon its true construction, the "notice purported to refer to the development for which permis-"sion under the 1947 Act was required, whereas in fact such "permission was not required. That, not the lack of clear indica-"tion, gave jurisdiction to quash." Lord Cohen similarly stated his conclusion in general terms[14]: "It was proved before the "magistrates that the development took place before the "appointed day, and it was agreed that no obligation rested on "the respondents to obtain permission under the law in force "before the appointed day. It seems to me that, in these "circumstances, the respondents proved that no such permission "was required in respect thereof, that is, in respect of 'the "'development to which the notice relates.' The magistrates, "therefore, had jurisdiction to quash the enforcement order, and, "in my opinion, they should have done so." The matter is dealt with perhaps more fully in my own speech; and I have already referred to the concluding paragraph, where I said[15]: "The "words in section 23 (4), 'no such permission was required in "'respect thereof,' are clearly capable of application to any case "in which permission was not in truth required under the 1947

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[12] [1957] A.C. 223.

[13] Ibid. 234.

[14] Ibid. 247.

[15] Ibid. 252.

"Act, whether because the development was of a kind which by "the terms of the Act called for no permission or because the "development, by reason of the date when it was carried out, "was outside the scope of the Act altogether. In the absence, "therefore, of any provision for the case of a notice related to "development alleged to have been carried out after July 1, 1948, "but executed in fact prior to that date, and having regard to the "incongruity which would otherwise appear to arise in the converse case of a notice related to development alleged to have "been carried out before, but in fact executed after, the appointed "day, I think the Court of Appeal and the Divisional Court were "right in holding that in the circumstances and upon its true "construction the enforcement notice of April 26, 1951, ought to "have been quashed by the justices." Although in this passage I do not refer to the problem which has arisen in this case, I venture to think that, in the light of the earlier argument in the speech, my conclusion must be taken to have been in favour of a construction of the relevant words rendering them applicable to any case in which permission was not, for any reason, required under the Act of 1947. Put in other words, I think that if we were to distinguish the present case from that directly covered by the *East Riding* case,[16] we would introduce an extremely narrow and unjustifiable refinement in the construction of the section.

Agreeing, then, as I do, with the judgment of Lord Goddard C.J., I agree also with him that *Keats* v. *London County Council*[17] must be taken to have been wrongly decided, and that the opinion to that effect expressed by the Divisional Court in *Norris* v. *Edmonton Corporation*[18] was correct.

We were referred to a number of other cases by Mr. Megarry in the *Guildford* case[19] and by Mr. Pennycuick. In none of these other cases was the point raised which calls for determination in the present case. I do not therefore find it necessary to refer further to them save to say that there is nothing in any of the judgments in those cases which is in conflict with the view that I have formed.

This court, like the Divisional Court, has been much assisted by the full arguments of Mr. Pennycuick and Mr. Lawrence, and also by the argument in the *Guildford* case[19] of Mr. Megarry which Mr. Pennycuick adopted, and I wish to acknowledge my indebtedness to counsel accordingly. Mr. Lawrence informed us that the particular concern of the Eastbourne Corporation (and other local planning authorities) was to obtain from the court a decision which would assist them in the performance of their duties under the Act. For this reason I have thought it desirable to deal somewhat fully with the arguments put before us. But in the end I have reached a clear conclusion that Mr. Pennycuick's contention should prevail. I think, therefore, that the appeal should be allowed. Since no other matter is raised in the appeal, the result will be that the question raised by the case stated will be answered in the affirmative, and that the justices were entitled to quash the enforcement notice.

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[16] [1957] A.C. 223.

[17] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[18] [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801.

[19] Post, p. 112.

I am authorised by ORMEROD L.J. to say that he agrees with the judgment which I have just delivered.

SELLERS L.J. On the construction of the words "if satisfied "that permission was granted under this Part of this Act for the "development to which the notice relates or that no such permis"sion was required in respect thereof," I would go the whole way with the reasoning and conclusion of Lord Goddard C.J. in his dissenting judgment.

No permission is required unless there has been development, and on their face the words "or that no such permission was "required in respect thereof" would permit, as I read them, of a contention that no permission was required because there had been no development.

If it is to be conceded that section 23 construed narrowly by itself can be made to work and can so provide a more limited jurisdiction to the justices, this construction admittedly would put the section out of harmony with the Act as a whole, as it involves ignoring the proviso to section 17 (2).

The interpretation which the appellants advance, and which my Lord has stated and developed in detail, relies on and accepts in full the proviso and leaves no repugnancy or inconsistency or, as Donovan J. puts it, no "real difficulty." [20]

Further, Donovan J. says [21]: "If local benches of magis"trates . . . can override the planning authority upon the "question whether something is 'development' or not, it is "obvious that they can interfere with all development plans, "and that a large measure of planning control (as distinct from "enforcement) has been placed in their hands. Had this been "Parliament's intention, I cannot believe that it would have been

[20] [1958] 2 Q.B. 41, 53.

[21] Ibid. 54.

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"effected by a mere proviso in a section dealing with a different "subject-matter."

The force of this comment seems to be minimised when it is seen that if the penal powers under section 24 of the Act were to be invoked, the justices would admittedly have power to consider whether development had taken place or not and so, if thought fit, "override" the planning authority.

Unguided by my Lord here and, perhaps, more compellingly by his speech in the *East Riding* case [22] in the House of Lords, I should not have felt any certainty or probability that by the words "or that no such permission was required in respect there-"of," the draftsman was intending to direct himself solely to the question whether the (assumed) development is of a kind for which no permission is required, but with that unimportant reservation, if unfettered, I agree entirely with the judgment delivered by my Lord and would allow the appeal accordingly.

Appeal allowed.
Case remitted to justices with the opinion that their decision was correct.
Leave to appeal to House of Lords.

Solicitors: *Clifford-Turner & Co.; Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne.*

E. D.

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[22] [1957] A.C. 223, 247.

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Feb. 25, 26, 27; *Mar.* 2, 23.

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Town and Country Planning—Development—Material change of user—Increase of user—Enforcement notice—Pre-Act user of land as caravan site—Number of caravans increased—Whether a material change of user—Fact or law—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 12.
Fact or Law.

The appellants in the second appeal were the owners of land used as a caravan site, and the appellants in the first appeal were the occupiers of the caravans on the land. From 1934 to 1955 the land had been used as a health and holiday camp. On July 1, 1948, when the Town and Country Planning Act, 1947, came into

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operation, there were 8 residential caravans on the land, and at the date of the hearing before the justices their number was 27. The respondents, as the local planning authority, served on the appellants an enforcement notice under sections 23 and 24 of the Town and Country Planning Act, 1947,[1] requiring them to discontinue the use of the land for the stationing of caravans in excess of 21 (the number for which the Minister of Housing and Local Government had granted planning permission).

The justices, on the application of the appellants, quashed the enforcement notice, holding that the increase in the number of caravans did not constitute development within section 12 of the Act.

The Divisional Court allowed the local authority's appeal from the justices' order on the ground that the justices had no jurisdiction to make the order quashing the enforcement notice:—

Held, (1) that the justices had jurisdiction to quash the enforcement notice.

Eastbourne Corporation v. *Fortes Ice Cream Parlour (1955) Ltd.*, ante, p. 92; [1959] 2 All E.R. 102 followed.

(2) That, assuming that this land had, at all relevant times, been used as a caravan site, whether the increase in the number of caravans from 8 to 27 constituted development as being a material change of use of land was not a question of law, but a question of fact, and that it was not open to the Court of Appeal to interfere with the finding of facts by the justices.

Semble, an increase or intensification of use of land might amount to a material change of use.

Decision of the Divisional Court reversed.

APPEALS from the Divisional Court.

These two appeals were heard together and arose out of the same facts. The second appeal, that of Mr. and Mrs. Penny, was alone argued. Mr. and Mrs. Penny were the owners of land in Tannery Lane, Ripley, Surrey, which was used as a caravan site. It was situated in the area for which the Guildford Rural District Council, the respondents, were the local planning authority. The appellants in the first appeal were some 23 persons who were occupiers of caravans on the land. The following facts appeared from the case stated by the justices for the county of Surrey acting for the Petty Sessional Division of Woking:

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[1] Town and Country Planning Act, 1947, s. 12: "(1) Subject to "the provisions of this section and "to the following provisions of this "Act, permission shall be required "under this Part of this Act in "respect of any development of land "which is carried out after the ap-"pointed day. (2) In this Act, "except where the context otherwise "requires, the expression 'develop-"'ment' means the carrying out of "building, engineering, mining or "other operations in, on, over or "under land, or the making of any "material change in the use of any "buildings or other land . . ."

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On September 16, 1957, a complaint was preferred by the appellants against the respondents for an order under section 23 of the Town and Country Planning Act, 1947, that an enforcement notice relating to the land in Tannery Lane, served on August 21, 1957, upon the appellants in pursuance of that section be quashed. The land to which the enforcement notice related was about 1½ acres in extent. From about 1934 until March, 1955, it was used as a health and holiday camp. The use involved: (1) the construction of chalets on the land for use as holiday homes, none of which remained in existence; (2) the use of the land for camping in tents; (3) the use of the land as a site for caravans; the number of caravans stationed on the land at any one time between 1934 and 1955 was never less than three or more than eight.

During the war not less than two of the caravans on the land were used as permanent residences. In June, 1955, the number of caravans on the land, all used as permanent residences, had increased to 15. The appellants then applied for permission under section 14 of the Act to continue the use of the land as a site for residential caravans up to a maximum number of 35. That application was refused. The appellants appealed to the Minister under section 16 of the Act. In April, 1956, a public inquiry was held. The number of residential caravans on the land had then increased to 21. On June 18, 1956, the Minister allowed the appeal to the extent that he permitted the use of the land for the stationing of not more than 21 caravans.

At the date of the service of the enforcement notice the number of caravans on the land was 26, and at the date of the hearing before the justices, 27.

On December 15, 1955, the respondents granted to the appellants a licence, pursuant to the provisions of section 269 of the Public Health Act, 1936, authorising the use of the land as a site for caravans not exceeding 30 in number.

It was contended by the respondents: (a) that the increase in the number of residential caravans on the land, which occurred between July 1, 1948, and the grant of permission by the Minister, constituted a material change in the use of the land and, accordingly, that there had been a development of the land for which permission was required under the provisions of section 12 of the Act; (b) that the permission given by the Minister was therefore a necessary permission granted with retrospective effect in the exercise of the powers under section 18 of the Act, which took effect according to its terms, and validly limited the number of caravans permitted to be stationed on the land to 21; (c) that the further increase in the number of caravans on the land making the total in excess of 21 was a development of the land carried out without permission under the Act.

It was contended by the appellants: (a) that the use of the land as a whole on July 1, 1948, was as a camping and caravan site and that the increase in the number of caravans on the land, which had occurred thereafter, did not amount to a material change of that use; (b) that, accordingly, the appellants did not require the permission for which they applied in 1955 and the permission which the Minister purported to grant was of no effect; (c) that there was no limit to the number of caravans which could lawfully be stationed on the land save that contained in the licence granted under the Public Health Act, 1936.

The justices held that the increase in the number of caravans from 8 to 27 did not, in the circumstances, constitute a material change of the use of the land, and quashed the enforcement notice. The respondents appealed to the Divisional Court. The Divisional Court held, following its own decision in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*,[2] that the justices had had no jurisdiction under section 23 (4) of the Act of 1947 to determine whether there had in fact been development within section 12 of the Act or not and the Divisional Court discharged the order of the justices.

The appellants appealed. Before giving judgment the Court of Appeal heard the appeal in the *Eastbourne* case.[2] The Court of Appeal, having reversed the decision of the Divisional Court in that case,[3] proceeded to give judgment on this appeal.

R. E. Megarry Q.C. and *Bernard Marder* for the appellants. The issues raised in these two appeals are identical. It is proposed to deal only with that of Mr. and Mrs. Penny, the owners of this caravan site. The Divisional Court having held in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*,[4] a case indistinguishable from the present, that the justices had no jurisdiction to decide whether there had been development, the present appellants submitted to an order being made by the Divisional Court allowing the council's appeal from the justices' order. The second point of law raised in this appeal did not arise and was not determined by the Divisional Court.

It is submitted, first, that on authority, on the construction

[2] [1958] 2 Q.B. 41; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

[3] Ante, p. 92.

[4] [1958] 2 Q.B. 41.

of the Act, and on principle and convenience, the *Eastbourne* case[4] was wrongly decided and the dissenting judgment of Lord Goddard C.J. was right. As the Divisional Court authorities stood when the judgments in the *Eastbourne* case[4] were delivered, there were six decisions involving the jurisdiction of the justices to quash an enforcement notice on the ground that no development had occurred; and of these, five rested on the basis that the justices had this jurisdiction. The other case, *Keats* v. *London County Council*,[5] on which the majority in the *Eastbourne* case[6] relied, thus stood in lonely eminence. It had been preceded by *Perrins* v. *Perrins*,[7] where the ratio decidendi was that it was because the issue of "no development" could be raised on an appeal against an enforcement notice that it could not be raised in a subsequent prosecution. As the Divisional Court is bound by its own decisions, it ought to have followed this decision in *Keats'* case[8] and in the *Eastbourne* case.[9] It is true that in *Francis* v. *Yiewsley and West Drayton Urban District Council*[10] the Court of Appeal held that failure to raise the point on an appeal was no bar to raising it on a subsequent prosecution, thus overruling one limb of *Perrins* v. *Perrins*[11]; but nothing that the Court of Appeal decided or said questioned the power of the justices on an appeal to decide the issue of development vel non. The other four cases inconsistent with *Keats'* case[12] are *Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ltd.*[13]; *Norris* v. *Edmonton Corporation*[14]; *Taylor* v. *Eton Rural District Council*,[15] and *Fyson* v. *Buckinghamshire County Council*.[16] In this last case, although the point was not argued, the matter is one of jurisdiction, and judgment was delivered after hearing the arguments in the *Eastbourne* case[17]; nevertheless, the court reached a unanimous conclusion irreconcilable with the majority judgment delivered in the *Eastbourne* case[17] eight days later.

In any case, to hold that the justices have no jurisdiction is inconsistent with the decision of the House of Lords in *East*

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[4] [1958] 2 Q.B. 41.

[5] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

[6] [1958] 2 Q.B. 41.

[7] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[8] [1954] 1 W.L.R. 41.

[9] [1958] 2 Q.B. 41.

[10] [1958] 1 Q.B. 478; [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529.

[11] [1951] 2 K.B. 414.

[12] [1954] 1 W.L.R. 1357.

[13] [1953] 2 Q.B. 178; [1953] 2 W.L.R. 1086; sub nom. *Lincoln County Council* (*Parts of Lindsey*) v. *Henshall* [1953] 1 All E.R. 1143.

[14] [1957] 2 Q.B. 564; [1957] 3 W.L.R. 388; [1957] 2 All E.R. 801.

[15] (1958) 9 P. & C.R. 430.

[16] [1958] 1 W.L.R. 634; [1958] 2 All E.R. 286.

[17] [1958] 2 Q.B. 41.

Riding County Council v. *Park Estates* (*Bridlington*) *Ltd.*,[18] as was rightly held to be the case in *Norris* v. *Edmonton Corporation.*[19] In the *East Riding* case[20] all the courts held that the justices had power to quash the enforcement notice because any development that had taken place had occurred before the Act of 1947 had come into force. There is no sensible distinction in principle between a power to quash because no development has ever occurred and a power to quash because no development has occurred since the Act of 1947 came into force, especially as this part of the Act is concerned only with what has happened after that date. It cannot be that jurisdiction depends on whether or not an irrelevant allegation of development before that date is made. The speeches of Viscount Simonds, Lord Cohen and in particular Lord Evershed are relied upon.[21]

Turning to the language of the Act, the principal provisions are sections 12, 17, 23, 24, 75 and 76. The phrase most in point is that part of section 23 (4) (*a*) which gives the justices a power to quash " . . . if satisfied that . . . no such permission was " required in respect thereof." This refers back to the earlier part of section 23 (4) (*a*), which refers back to section 23 (2), which in turn refers back to section 23 (1). As thus expanded by reference back, the phrase reads: " . . . if satisfied that . . . " no permission under this Part of the Act was required in respect " of the development which is alleged to have been carried out " without the grant of permission required in that behalf under " this Part of this Act. . . ." The word " alleged " shows that the justices are to have power to investigate the truth of the allegation of development without the requisite permission. This is a compound allegation, and the truth of each part may be examined; there is no ground for distinguishing between " development " and " without the grant of permission," and saying (as did the majority of the Divisional Court) that the justices may examine the latter but not the former.

The point is concluded by the proviso to section 17 (2), which necessarily involves the conclusion that the justices may quash an enforcement notice on the ground of " no development." [*Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[22] referred to.] If the proviso and section 23 (4) (*a*) were necessarily inconsistent, the latter might well prevail; but on any view the reading of section 23 (4) (*a*) rejected by the majority of the Divisional Court is a possible reading, and as it is both consistent with the proviso and complementary to it, that reading should be preferred. To hold part of an Act void for repugnancy is a dernier ressort. Nor is there any danger that the justices may "interfere with all development plans" as the majority suggested.[23] Development plans neither give nor take away any planning permissions, nor determine what is or is not development. Development plans indicate what permissions are likely to be granted and what refused, but they remain quite distinct from planning permissions and the definition of development, and cannot be affected by any decision of the justices.

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[18] [1957] A.C. 223; [1956] 3 W.L.R. 312; [1956] 2 All E.R. 669.

[19] [1957] 2 Q.B. 564.

[20] [1957] A.C. 223.

[21] Ibid. 234, 246, 247, 250–252.

[22] [1958] 1 Q.B. 554, 566, 567; [1958] 2 W.L.R. 371, 379; [1958] 1 All E.R. 625, 629.

It is common ground that at the later stage (i.e., on a prosecution), the justices have jurisdiction to determine whether or not there has been development; it therefore cannot be said that the issue is one which is unsuitable for decision by the justices at the earlier stage (i.e., on an appeal). It is also highly inconvenient both to the public and the planning authorities if the issue cannot be determined at the earlier stage. Thus in a case such as this the landowner would be unable on an appeal to test whether disobedience to the enforcement notice would be an offence; and where the alleged development consisted of building work or the like, it could not be determined on an appeal whether the planning authority could safely enter the land under section 24 (1) and demolish the offending structure. An action for a declaration in the High Court would be a costly and less speedy alternative, and the courts ought not to make this course necessary unless it is abundantly clear that Parliament intended it.

It is secondly submitted that the magistrates did not err in law in holding that the increase in the number of the caravans on this site did not constitute development. If they made no error in law, their decision must stand. On any footing the stationing of 21 caravans must be permissible, because it has been held that this is a caravan site and the increase to that number is merely an intensification of the permitted use. If that is wrong, the Minister has given permission for the stationing of 21 caravans. The increase above that number is a mere intensification of the permitted use.

The ejusdem generis rule should be applied in construing section 12 (2) of the Act of 1947. There the "other operations" referred to must be of a similar character to building, engineering and mining, that is, something done to the land itself. Placing caravans on the land is not in the same genus. As each motor-car is put on a car park, that does not constitute separate development. Under the Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950, No. 1131), it is permissible to pass from one use to another in the same class of use.

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[23] [1958] 2 Q.B. 41, 54.

The provisions in section 12 (3) with regard to the use as two or more separate dwelling-houses of a building previously used as one dwelling-house do not apply to caravans. Overcrowding is dealt with by the Public Health Acts. In considering whether to grant a licence under the Public Health Act the authority must exclude from consideration all planning matters.

Planning policy is not a matter for the court. The question is whether intensification of use can be a material change of use. The existing use of this land is that of a caravan site; that does not mean that the use is limited to any particular number of caravans. In the case of a right of way the volume of user may be changed but not the nature of the user: *White* v. *Grand Hotel Eastbourne Ltd.*[24] If at the relevant date there were only one or two caravans on the land the question would be whether it was a caravan site. The magistrates' decision should stand unless it results in an illogical result: *Brooks* v. *Flintshire County Council.*[25] In *Taylor* v. *Eton Rural District Council*[26] there was a change of use from agricultural use (with three incidental caravans) to use as a caravan site; here there was no change of use but merely an intensification of the camping use that has prevailed throughout. *Brookes* v. *Flintshire County Council*[27] shows that the proper test for deciding whether "development" has occurred is geographical rather than numerical. It is the area of the land subjected to the use, not the number of vehicles using it.

The Minister's decision under section 17 (2) whether an operation is "development" is final, subject to a right of appeal against an enforcement notice. His function is judicial and his decisions, therefore, stand in a different category from merely administrative directions. [Reference was made to *London County Council* v. *Central Land Board*[28] and *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government.*[29]]

[24] [1913] 1 Ch. 113.
[25] (1956) 6 P. & C.R. 140.
[26] 9 P. & C.R. 430.
[27] 6 P. & C.R. 140.
[28] [1958] 1 W.L.R. 1296, 1298; [1958] 3 All E.R. 676.
[29] [1958] 1 Q.B. 554, 573; [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625.

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[Lord Evershed M.R. referred to *Attorney-General* v. *Smith*.[30]]

If this is an "operation," it is strange that it has never been so regarded until now. The point was not directly put in *Postill* v. *East Riding County Council*,[31] but it was generally assumed in that case that the use of the land for caravans fell to be considered under section 12 (5) and not as an "other operation" under section 12 (2). "Other operation" should be construed ejusdem generis with the preceding words and it covers any operation affecting the physical characteristics or nature of the land. Driving a car or caravan on to land would not physically affect the land.

This is question of fact and degree for the justices to determine. The Court of Appeal will not interfere with their finding unless it is plainly wrong: *Stepney Borough Council* v. *Joffe*.[32] It must be shown that the justices went wrong in law in deciding that the increase from 8 to 27 caravans does not in the circumstances of this case constitute a change of use. If that decision could be reached on the evidence, then it must stand. It is difficult to lay down a numerical test in view of what has been said on the analogous provisions in the Rent Acts by the House of Lords in *Palser* v. *Grinling*.[33] It was there said that it was for Parliament and not for the courts to lay down percentage tests that might be applicable in deciding what was "substantial."

Nigel C. Bridge for the respondent local authority. In this case the Minister granted permission retrospectively under section 18 (1) for 21 caravans. He was not purporting to make a determination under section 17 whether permission was required. There is no indication that any such application was made to him. The appellants were then asking for an increase in the number of caravans to 35 from 21, and the Minister's references to existing use rights were inserted only to explain that he gave permission for 21, because he too took the view that some caravans had been there on the appointed day. In the court below it was conceded by the landowner that if the Minister purported to grant permission on an appeal under section 16, that would have been on the basis that permission was needed for what was done between the appointed day and the date of the Minister's decision. It was conceded that between 1948 and 1956 there had been an increase in numbers to 21. That increase must have been "development" unless the court accepts the appellants' submission that once a caravan use is established in relation to a piece of land the intensity of that user is irrelevant, and that the number of caravans can be increased without involving any change of user. If there was development between 1948 and 1956 for which permission was needed, then it was conceded that the further increase to 27 would also need permission. The primary issue on the appeal is the initial increase from eight to 21.

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[30] [1958] 2 Q.B. 173; [1958] 3 W.L.R. 81; [1958] 2 All E.R. 557.

[31] [1956] 2 Q.B. 386; [1956] 3 W.L.R. 334; [1956] 2 All E.R. 685.

[32] [1949] 1 K.B. 599; 65 T.L.R. 176; [1949] 1 All E.R. 256.

[33] [1948] A.C. 291, 317; 64 T.L.R. 2; [1948] 1 All E.R. 1.

The product of an operation on land becomes part of the realty, in the sense of becoming a fixture. That is the genus. The test of rateability may well be applicable. The question is whether, on all the evidence, the justices should have concluded that there was, first, a change of use, and, secondly, that it was a material change. It is submitted that any change of circumstances affecting the land is a change of use, otherwise "material" would be otiose. It is difficult to conceive a change in the broad character of use which is not material. The appellants say that by the Use Classes Order certain operations are deemed not to involve a change of use, but it is submitted that the order only indicates that a change between, for example, one type of a shop and another is not to be treated as a material change of use. There would manifestly be no material issue for the planning authority in such a change. It does not follow that intensification of use may not involve a material change taking the use out of one category into another. On the facts of a particular case, an increase may involve use as a different type of caravan site and materially alter the character of use. An example of an analogous change would be intensification of use for a light industry which might involve a change of use to a use not within that description.

Here the justices decided that there was a mixed use as a holiday camp, which involved three different types of use. The first was chalets (which have all gone), the second, tents for camping, and, third, there were caravans. A change of use is material if it raises any issue which is material to any consideration of planning policy. Two such issues are involved in the present case. Intensification of use affects the appearance of the land, and, second, the distribution of population. One object of the "planning" machinery is to maintain the balance between population and the opportunities of employment, transport and public services, etc. A site where the caravans are at a gracious distance from each other may be quite different from one where they are crowded together.

The first question is the general one, what sort of change would be material? The further question is whether on the facts of the present case the intensification had amounted to a material change of use. The permitted use was defined by the Minister in this case as 21 caravans. Any increase in the number as compared with the number on the appointed day is a material change of use. In *Brookes* v. *Flintshire County Council* [34] it was practicable to ascertain the precise part of the field where the caravans had been placed, and in that case the permitted use was limited to a strip of land, so that any extension beyond those confines involved a material change of user. In other circumstances, where the user had not been confined to a particular place, the material change might be an increase in numbers. If all this land was used for 27 caravans, then the former use of summer camping must be excluded. A permanent residential site is quite different from the previous use as a holiday camp. In determining whether intensification involves a material change of use, the magistrates are afforded some guidance by section 20 and the Third Schedule, Part II. If the question whether there has been a material change is a question for the magistrates and turns on the quantum of use, the magistrates must have misdirected themselves on the construction of the Act if they concluded that an increase of nearly 300 per cent. in the aggregate area of the land devoted to this purpose is not material. Section 12 (3) (*b*) is an illustration of Parliament construing its own language and showing how it should be applied to a not dissimilar problem. If it is established that there has been a change of use, then the issue of materiality is open and it is difficult to see how an increase from 8 to 27 caravans could be anything other than material.

Megarry Q.C. in reply. The agreed statement of facts was fuller than the case stated. The only suggestion in the case stated of a change is not from a health and holiday camp to a caravan site exclusively but an increase in the number of residential caravans on the land. It is wrong to assume that use as a health and holiday camp cannot be wholly carried out in caravans. If one has a change from one closely similar category to another, the change may be immaterial from the planning point of view. On such a change the landowner can either say that the change is immaterial, or he can rely on the Use Classes

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[34] 6 P. & C.R. 140.

Order. If the Order does not apply, the relevant test is whether the change of use is material or not.

J. D. James held a watching brief for the Eastbourne Corporation.

Cur. adv. vult.

March 23. The following judgments were read.

Lord Evershed M.R. These two appeals raise precisely the same questions, namely: first, whether the justices at Woking had jurisdiction under the Town and Country Planning Act, 1947, to inquire into and determine whether there had in fact been development on the land owned and occupied by the appellants, within the meaning of section 12 of the Act; and second, if so, whether they were entitled to conclude, as they did, that there had not been any development. In the circumstances, Mr. Megarry confined himself in argument to the appeal by Mr. and Mrs. Penny, the owners of the land in question; and this judgment is similarly confined in terms.

The facts appear from the case stated and may be briefly summarised as follows. The appellants, Mr. and Mrs. Penny, are the proprietors of 1½ acres of land within the jurisdiction of the respondents, the Guildford Rural District Council, as the appropriate local planning authority. On July 1, 1948—the date of the coming into operation of the Town and Country Planning Act, 1947—the 1½ acres were being used (as they had been before that date and as they have continued to be used since) as a site for residential caravans. On July 1, 1948, the number of such caravans appears to have been eight, but thereafter the number steadily increased. In 1955 and 1956 recourse was had to the powers and jurisdiction of the local planning authority and (on appeal) to the Minister, the result of which was that the Minister permitted 21 caravans to be placed on the 1½ acres. The appellants, however, were not satisfied with the scope allowed by this determination on the part of the Minister; and it is not now in doubt that, in spite of the time and the trouble taken, we must determine the question before us without regard to what was then done.

When the matter came before the justices, the number of caravans on the site was 27, and the justices were of opinion that the increase in the number of caravans from 8 to 27 did not, in the circumstances, constitute a material change of use

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of the land and they accordingly quashed the council's enforcement notice dated August 21, 1957.

The matter having then been taken, by way of case stated, to the Divisional Court, the present appellants conceded before that court that its recent decision in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955) Ltd.*[1] must cover this case also, and they submitted, accordingly, to an order allowing the council's appeal and setting aside the justices' order. From that order by the Divisional Court the matter has now come on appeal before this court.

On the first question, that of the jurisdiction of the justices, we have had the advantage of a full and careful argument by Mr. Megarry. Mr. Bridge, for the local authority, did not desire to contest that point; and in any event the judgments which we have now delivered in the *Eastbourne* case[2] have determined that point in the present case in Mr. Megarry's favour. There remains, however, the second question: were the justices justified in concluding, as they did, that the increase from 8 to 27 in the number of caravans on this site did not amount to a material change in the user of the land? If it is open to the justices to decide the question aye or no, then according to the appellants it is a question of fact and degree, with which this court cannot interfere.

It was said by Mr. Megarry that the 1½ acres in question on July 1, 1948, were being used as a caravan site, and that their use as such has not changed materially or otherwise by the mere fact of adding to the number of caravans; and so the justices must be taken to have held. At one time during the argument the question was raised by the court whether the placing—or, to use the word sometimes used, the stationing—of caravans upon the land might constitute "other operations on land" within the formula in section 12 (2), which reads (so far as relevant): "In this Act . . . 'development' means the carrying out of "building, engineering, mining or other operations . . . on . . . "land. . . ." This point was not one taken or, indeed, put to us at all by Mr. Bridge; and on reflection I have no difficulty in rejecting it. After all, these caravans (as I understand) remain, and remain always, mobile on their wheels, and never become so attached to the land that they could fairly be regarded as equivalent to dwelling-houses of some kind.

Mr. Megarry contended that the mere intensity of user or occupation could never be relevant. As a general proposition, I am not prepared to accept that argument; nor, indeed, is it necessary to do so. Mere intensity of user may (as it seems to me; but I must not be taken as deciding this point) affect a definable character of the land and of its use—or one of them. An example was taken during the argument of some housing estate, or part of a housing estate, on which houses had been erected of a certain density per acre. If the density of the houses on that part of the estate is greatly increased, it seems to me that it may—I say no more—affect the material nature or character of the housing estate as such, or that part of it, and, therefore, of the user of that part of the land. I refer also to another example taken during the argument—that of a cricket ground. If the Kennington Oval Cricket Ground were used so as to provide continuously a great number of pitches, on which boys or others could contemporaneously play cricket during the summer, no doubt the Kennington Oval would remain a cricket ground but it would be a cricket ground materially changed: it would no longer be a first-class county cricket ground but would be a cricket ground of a different kind. It is also, as it seems to me, obvious that increasing intensity of use or occupation may involve a substantial increase in the burden of the services which a local authority has to supply, and that, in truth, might, in some cases at least, be material in considering whether the use of the land had been materially changed.

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[1] [1958] 2 Q.B. 41; [1958] 2 W.L.R. 886; [1958] 2 All E.R. 276.

[2] Ante, p. 92.

These are questions all of which would depend upon the particular circumstances of the particular cases in which they arose for decision. They do not arise here; and I therefore express no view about them, leaving it, rather, open for future consideration when the occasion (if ever) arises. But, as I have earlier indicated, I am not able to accept, and find it unnecessary to accept, the wide and general proposition which Mr. Megarry put forward.

But none the less, all these matters—including the illustrations which I have given—are, primarily at any rate, questions of fact for the justices; and in this case there seemed to be no such points taken of the nature of the examples which I have given. So much I gather from the case itself. But a reference to the case does show this—and it is a matter which caused me some concern. Paragraph 2 of the case states, in very brief form, the relevant facts as found. The first paragraph is merely the date and fact of the enforcement notice. The second is: " The land to which " the said enforcement notice relates (hereinafter called ' the "'land') is about 1½ acres in extent. From about 1934 until "March, 1955, the land was used as a health and holiday camp. "The said use involved: (1) the construction of chalets on the "land for use as holiday homes, none of which now remains in "existence"—though, I interpolate, the date of their final disappearance is unstated—"(2) the use of the land for camping in "tents; (3) the use of the land as a site for caravans. . . ." Then the case goes on to deal with the number of caravans.

It seemed to me—and seems to me—that a health and holiday camp may well be something sensibly or materially different from a caravan site; and, indeed, so much appears from the language of the case itself, which states that of the three uses which the health and holiday camp involved only the third was that of a caravan site. Many activities might be associated with a health and holiday camp which would not be the same as its use for caravans. But, notwithstanding that statement in the case, it has never, as I understand, in the argument either in this court or before the justices, been contended that this 1½ acres of land was used for any purpose save that of a caravan site, or that it was, save in that sense, a health and holiday camp.

It therefore comes back to this, as the question has been put and argued here and before the justices: Assuming that these 1½ acres of land were from first to last used as a caravan site, did the increase from 8 caravans to 27 caravans, in the circumstances as found, constitute or amount to a material change? I can find no problem of law involved in the posing of that question. The justices, who heard the arguments and found the facts, answered the question in the negative; and in all the circumstances I conclude (as Mr. Megarry contended) that it is not open to this court to interfere with that finding of facts. I therefore would allow the appeal on both points.

SELLERS L.J. I agree with my Lord that the decision of fact in this case, whether or not there has been development, lies within the province of the justices, and that it cannot be said that they erred in law in their finding. I too, like my Lord, would not wish to be taken, however, as supporting a view that no increase or intensification of user could in any circumstances amount to a change of user. To consider the concept broadly I would take an illustration from the sea rather than one which might arise under the Town and Country Planning legislation. If a roadstead, within the control of a harbour authority, were restricted to the use at one time by only two vessels of not less than 2,000 tons, and then it became open to all vessels irrespective of tonnage or the number at anchor, then, although it remained a roadstead by its situation and nature and could be so described, the change in its user might fundamentally change its character as an anchorage, and might by its changed user make it that vessels of 2,000 tons or over could no longer safely use it by reason of the presence of other craft. A change of this sort would appear to be a material change and might affect the whole planning arrangement for vessels using a port. I have not sought to visualise circumstances which might arise on land.

I agree with my Lord that this appeal should be allowed on both points.

LORD EVERSHED M.R. I am authorised by ORMEROD L.J. to say that he also agrees with the conclusions of my brother and myself.

Appeals allowed.

Solicitors: *Garber, Vowles & Co.; Jaques & Co. for Barlow, Norris & Jenkins, Guildford; Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne.*

B. A. B.

REGINA *v.* GREEN.

C. C. A.
1958
Feb. 3.

Lord Goddard C.J., Hilbery, Cassels, Barry and Salmon JJ.

Criminal Law—Sentence—Probation order—Breach—Sentence of two months in a detention centre for subsequent offence—Minimum sentence three months—Illegal sentence—Whether conviction amounted to breach of probation order—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 6 (4) (*b*) (6), 8 (5).

Criminal Law—Court of Criminal Appeal—Sentence, appeal against—Breach of probation order—Jurisdiction of court—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (3).

The appellant was convicted of shop-breaking and larceny in January, 1957, and placed on probation for two years. During the currency of the probation order he was convicted of a further offence for which in October, 1957, he was sentenced to two months in a detention centre. Under section 18 of the Criminal Justice Act, 1948, the minimum sentence to a detention centre in the circumstances being three months, the Home Secretary ordered his release.

[Reported by RICHARD HARTLEY, Esq., Barrister-at-Law.]

The appellant was subsequently sentenced at quarter sessions under section 6 (4) (*b*) of the Act of 1948[1] for the offence for which he was placed on probation and an order was made for Borstal training. He appealed against that sentence:—

Held, (1) that, in considering an appeal against sentence for the breach of a probation order, the Court of Criminal Appeal was not limited to a consideration of the quantum of the sentence, but had jurisdiction to consider whether there had been a breach of the order at all for which any sentence could be imposed on the appellant.

(2) That by virtue of subsection (6) of section 6 of the Act of 1948 quarter sessions could only deal with a breach of a condition imposed by the probation order and there was no power under that section which enabled the court to deal with a further offence committed during the probation period.

(3) That as, if the sentence of two months' detention had been brought before the Divisional Court by way of certiorari, that court would have quashed it, that sentence should not be allowed to stand as a breach of recognisance and, accordingly, the sentence of Borstal training would be quashed.

Quaere whether the words "convicted and dealt with" in section 8 (5) of the Act of 1948 mean that justices have made some order so that they are functus officio or whether it means convicted and sentenced.

Per curiam. It was an unfortunate hiatus in the law that where a sentence had been passed by magistrates not justified by law the High Court had no power to amend the sentence but could only quash the conviction.

APPEAL against sentence.

In January, 1957, the appellant, Noel Green, who was aged

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[1] Criminal Justice Act, 1948, s. 6: ". . . (4) . . . (*b*) where the probationer is brought or appears before "the court of assize or quarter sessions, and it is proved to the satisfaction of that court that he has "failed to comply with any of the "requirements of the probation order, "that court may deal with him, for "the offence in respect of which the "probation order was made, in any "manner in which the court could deal "with him if he had just been convicted before that court of that offence. ". . . (6) . . . and without prejudice "to the provisions of section 8 of this "Act, a probationer who is convicted "of an offence committed during the "probation period shall not on that "account be liable to be dealt with "under this section for failing to "comply with any requirement of the "probation order."

S. 8 (5): "Where it is proved to the "satisfaction of the court by which "a probation order or an order for "conditional discharge was made ". . . that the person in whose case "that order was made has been convicted and dealt with in respect of "an offence committed during the "probation period, or during the "period of conditional discharge, as "the case may be, the court may "deal with him, for the offence for "which the order was made, in any "manner in which the court could "deal with him if he had just been "convicted by or before that court of "that offence."

19, was placed on probation for two years by the Buckinghamshire Quarter Sessions for shop-breaking and larceny. In October, 1957, he pleaded guilty before the Odiham justices sitting at Aldershot to a charge of larceny and was sentenced to be detained for two months in a detention centre. Under section 18 (1) of the Criminal Justice Act, 1948, the minimum term to which the appellant could have been ordered to be detained in the circumstances was three months, and, accordingly, the Home Secretary, while not quashing his conviction, ordered his release. In November, 1957, the Buckinghamshire Quarter Sessions held that the result of the trial before the Odiham justices was not a "conviction" within section 8 of the Act of 1948, but that, because the appellant had pleaded guilty before the justices, this amounted to a breach of his recognisances within section 6 of the Act of 1948 and sentenced him to Borstal training.

Green appealed on the grounds that as the conviction could have been quashed by way of certiorari it could not be used to support a breach of recognisance, and that the chairman of quarter sessions had no power to act under section 6 because certain preliminary procedure laid down in that section had not been carried out. On the appeal the Crown raised a preliminary point that the court had no jurisdiction to consider the question of breach of probation but only the quantum of the sentence.

On January 28, 1958, the Court of Criminal Appeal adjourned the appeal to a court of five judges.

J. M. Milne for the Crown. It is not in dispute that as the finding of a breach of probation is not a conviction this appeal can only be against sentence. Under section 4 (3) of the Criminal Appeal Act, 1907, the court only has power to consider the quantum of the sentence and has no jurisdiction to inquire whether the appellant was in breach of probation. The court has acted for over 50 years as if it had power to look at the breach of probation, but this point has never been taken before. An authority directly contrary to the Crown's contention is *Rex* v. *Smith*[2] where, after referring to *Rex* v. *Callaghan*,[3] in which the court expressly stated that it was not determining whether or not there was power to consider the breach, it was held that where there was an appeal against sentence on the ground that the appellant had not broken his recognisance he was entitled to appeal against the whole of the sentence. In *Rex* v. *Pine*[4] the

[2] [1925] 1 K.B. 603; 41 T.L.R. 359.

[3] (1913) 8 Cr.App.R. 185.

[4] (1932) 24 Cr.App.R. 10.

decision that there had been a breach of recognisance was referred to as a conviction, but this was disapproved of in *Rex* v. *David*,[5] which followed *Rex* v. *Smith*.[6]

Denis Henry for the appellant. Section 4 (3) of the Act of 1907 only sets out the machinery to be followed and ought not to be construed so as to cut down the general right of appeal given by section 3 (*c*) of that Act. [*Rex* v. *Ettridge*[7] was referred to.]

As regards the appeal itself, quarter sessions had no jurisdiction to proceed under section 6 of the Criminal Justice Act, 1948, because the procedure necessary for bringing the appellant before the court had not been carried out and section 6 is only applicable to deal with breaches of conditions imposed by a probation order and does not apply where a person has been convicted for an offence. Quarter sessions were right in holding that section 8 of the Act of 1948 did not apply as the words of that section ". . . that the person in whose case that order was made has "been convicted and dealt with in respect of an offence com-"mitted during the probation period . . ." must mean legally convicted and sentenced. The conviction was bad on the face of the record and would have been quashed on a certiorari as the court has no power to amend the conviction. [*Rex* v. *Willesden Justices, ex parte Utley*[8] and *Rex* v. *Head*[9] were referred to.]

J. M. Milne in reply. On the appeal itself it must be conceded that the decision under section 6 cannot be upheld.

LORD GODDARD C.J., delivering the judgment of the court, stated the facts and continued: Quarter sessions came to the conclusion that they would deal with the appellant under section 6 of the Criminal Justice Act, 1948, which enables the court to deal with a breach of conditions which may be imposed on a person who is put on probation. With regard to a young offender very often one of the conditions of the probation is that he shall live at a certain place or where directed by the probation officer. Sometimes a condition is imposed that he shall not live at a certain place, and there are various other terms which the court can place on a probationer and, of course, there is always the condition that he shall keep the peace. Sometimes there is a condition inserted that he shall lead an industrious life so that if he is offered work and will not take it he may be brought before the court for breach of probation, but apparently section 6 of the Act is meant to deal only with breaches of that description because the concluding words of subsection (6) of that section are "and without prejudice to the provisions of section 8 of this "Act, a probationer who is convicted of an offence committed "during the probation period shall not on that account be liable "to be dealt with under this section for failing to comply with "any requirement of the probation order"; so section 6 is not applicable.

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[5] (1939) 27 Cr.App.R. 50; [1939] 1 All E.R. 782.

[6] [1925] 1 K.B. 603; 41 T.L.R. 359.

[7] [1909] 2 K.B. 24; 25 T.L.R. 391.

[8] [1948] 1 K.B. 397; 64 T.L.R. 21; [1947] 2 All E.R. 838.

[9] [1957] 3 W.L.R. 862; [1957] 3 All E.R. 426.

Mr. Henry has quite rightly called attention to the fact that there is a certain procedure laid down under section 6 whereby the probationer has to be brought before a court of summary jurisdiction, and if the probation order was made by a court of assize or quarter sessions he has, under subsection (3) (*b*), to be committed in custody or released on bail until he can be brought or appear before the court of assize or quarter sessions. Then when he is brought before either of those courts "and it is proved "to the satisfaction of that court that he has failed to comply "with any of the requirements of the probation order, that court "may deal with him, for the offence in respect of which the "probation order was made, in any manner in which the court "could deal with him if he had just been convicted before that "court of that offence" (subs. (4) (*b*)).

Before I deal with section 8, I think the first point we have to deal with is this: Mr. Milne has addressed an interesting argument to the court whether there is any right to appeal here at all because, he says, there has been no conviction against which an appeal will lie, and the only possible appeal would be against the quantum of sentence when one is dealing with an appeal against sentence. But it appears from the cases which Mr. Milne has most properly brought to our attention that from a very early period in the history of this court the court has always dealt with the question whether a person brought before a court for a breach of recognisance has a right of appeal, and he has always been granted a right of appeal. One case in which the court has doubted, but the doubt was afterwards set at rest, is *Rex* v. *Smith*,[1] a judgment given by Salter J. Since that case I think it has been quite clear that this court must be taken to have decided that they always have power to deal with these cases where a sentence is passed on a person who is brought before the court under the terms of a probation order or a common law recognisance and is subsequently sentenced. We think, therefore, that we should not be following the cases which have been decided if we held that there was no right of appeal.

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[1] [1925] 1 K.B. 603; 41 T.L.R. 359.

Then what are we to do? We have said that we do not think that section 6, under which quarter sessions purported to act, applies. We do not think that the attention of quarter sessions could have been called to the concluding words of subsection (6). Quarter sessions did consider section 8, and the difficulty which they felt with regard to that section is a very real difficulty. It is the difficulty of using a conviction which is recognised to be bad so far as the sentence passed on that conviction is concerned to establish a ground for saying that a person had committed a breach of recognisance. The matter is put quite shortly in the appellant's notice of appeal when he says: "In September, "1957, I was charged with the stealing of a cycle and sent to "a detention centre for two months by the Aldershot magistrate. "It was later found that the minimum sentence was three "months and the offence was squashed and I was discharged "after serving only eight days. If this offence was squashed I "fail to see how I could be charged with breach of probation for "which I have received Borstal training." In other words, he is saying that the conviction for which he was brought before the court could not be used to say that he had committed a breach of probation. As I have said, the conviction in fact never was quashed, but it is quite clear that if the appellant could have been advised at the time, he would have been advised to apply for an order of certiorari to this court to bring up that conviction before the Aldershot magistrates and get it quashed, and quashed it would have been. I think it is an unfortunate hiatus in our law, and one to which the Queen's Bench Division has on more than one occasion called attention, that where a conviction by magistrates is brought before the court and where the magistrates per incuriam have passed a sentence which is not justified by law as, for instance, where they impose a fine of £10 in what they regard as a very bad case, but the statute only allows a fine of £5 to be ordered, the High Court has no power to amend. They can only look at the conviction, and, it being bad on its face, set it aside. It is quite absurd, because if a man appeals against his sentence to quarter sessions, quarter sessions can put the matter right. If a man is convicted on indictment and an illegal sentence is passed, this court can put it right. It is only where a sentence is passed by magistrates and is challenged by means of certiorari that the court has no power to put it right,

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and I hope at no great distance of time a provision will be made in the law, though it must be made by an Act of Parliament, to give the Queen's Bench power to alter an illegal sentence which is passed to a legal sentence because otherwise the person goes unpunished.

The one thing which has given us trouble in this case is that subsection (5) of section 8 provides: "Where it is proved to the "satisfaction of the court by which a probation order or an order "for conditional discharge was made, or, if the order (being a "probation order) was made by a court of summary jurisdiction, "to the satisfaction of that court or the supervising court, that "the person in whose case that order was made has been con- "victed and dealt with in respect of an offence committed during "the probation period, or during the period of conditional dis- "charge, as the case may be, the court may deal with him, for "the offence for which the order was made, in any manner in "which the court could deal with him if he had just been con- "victed by or before that court of that offence." Those words "convicted and dealt with" cause some difficulty. It may be on their true construction that it simply means that the magistrates have made some order so that they are functus officio; or it may be said it means convicted and sentenced, and therefore dealt with. The court does not propose to resolve that difficulty, and really it is more or less academic. What we do feel is that as the sentence that was passed on the appellant by the magistrates at Aldershot could not be upheld because it was for two months instead of three months, and as for that reason the Home Secretary felt obliged to discharge him from custody, and as, if the case had been brought before the Divisional Court by certiorari they would have quashed it, we do not think on the whole we ought to allow that sentence to stand as a breach of recognisance. If it had been brought before the Queen's Bench Division the conviction would have had to be quashed, and, of course, if the conviction was quashed, then, as the appellant argues in his notice of appeal, it could not have been used to support a breach of recognisance. It is unsatisfactory, it is wholly technical, and there are no merits in the application at all, as Mr. Henry, who has appeared for the appellant and has quite properly taken every point, has admitted, but the criminal law still allows technical points to be taken and, if the technical point succeeds, the prisoner goes unpunished. In this case it may be unfortunate that the appellant, who is obviously in need of discipline and training, will have to be discharged, but this court

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cannot see any way in which this order can properly be upheld, and the appeal is therefore allowed and the appellant will be discharged.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; N. M. Fowler, High Wycombe.*

C. C. A.

1959
May 11.

Lord Parker C.J., Donovan and Salmon JJ.

REGINA *v.* HARMAN.

Criminal Law—Court of Criminal Appeal—Sentence, appeal against—Jurisdiction of court—Failure to surrender to bail—Recognisance estreated with alternative of six months' imprisonment—Jurisdiction of Court of Criminal Appeal to hear appeal—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *ss.* 3, 21.

The appellant, who was granted bail pending his trial upon indictment for office-breaking and larceny, had failed to surrender to his bail. When his trial eventually took place at London Sessions, in addition to a sentence of three years' imprisonment for the offences to which he pleaded guilty the chairman said his recognisance of £100 was estreated and that, if he did not pay, the alternative was a further six months' imprisonment to be consecutive upon the three years. On appeal against that further sentence:—

Held, that the words "any order made on conviction" in section 21 of the Criminal Appeal Act, 1907 [1] (in which "sentence" is defined), meant any order made as a consequence of conviction and not any order made at the time of conviction. As the sentence of six months' imprisonment had nothing to do with the conviction the court had no jurisdiction under section 3 of the Act to entertain the appeal which was accordingly dismissed.

Rex v. *London Sessions, Ex parte Beaumont* [1951] 1 K.B. 557; [1951] 1 T.L.R. 258; [1951] 1 All E.R. 232 applied.

APPEAL AGAINST SENTENCE.

The appellant, James Alfred George Harman, together with two other men, pleaded guilty at County of London Sessions on

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[1] Criminal Appeal Act, 1907, s. 3: "A person convicted on indictment "may appeal under this Act to the "Court of Criminal Appeal— . . . "(*c*) with the leave of the Court of "Criminal Appeal against the sen- "tence passed on his conviction, "unless the sentence is one fixed by "law."

S. 21: "The expression 'sentence' "includes any order of the court made "on conviction with reference to the "person convicted. . . ."

February 10, 1959, to two charges of office-breaking and larceny. The offences had been committed on July 18, 1958. The appellant had been granted bail by the magistrate in the sum of £100, but he failed to surrender to his bail and was not arrested until January 15, 1959. He was sentenced to three years' imprisonment for the offences to which he had pleaded guilty. His recognisance of £100 was estreated and later in the day the chairman (R. E. Seaton, Esq.) informed the appellant that if he failed to pay the £100 the alternative was a further six months' imprisonment to be consecutive upon the three years imposed for the office-breaking and larceny. He appealed against that further sentence, claiming to be entitled to do so by virtue of section 3 of the Criminal Appeal Act, 1907.

Peter Bruce for the appellant. The only question is whether an appeal lies to this court from the order of the deputy chairman imposing six months' imprisonment in relation to the forfeiture of the recognisance. If section 14 of the Criminal Justice Act, 1948, is read literally to refer to recognisances generally and the forfeiture thereof, not only does it apply in cases such as the present but also in cases of sureties and witnesses bound over to attend a trial. In all those cases the court would have power under the section to pass an indefinite sentence of imprisonment and a large number of persons might become liable under the Act to indefinite sentences. The object behind the Criminal Justice Act, 1948, was to provide new methods of dealing with offenders: see the preamble to the Act. If section 14 refers only to "offenders" the court ought to read forfeiture of recognisances as dealing only with a person who has come up for sentence having entered into recognisance to do so. On that reading an appeal lies but only against the sentence passed for the original offence.

[LORD PARKER C.J. Why do you suggest that the term of imprisonment under section 14 is indefinite?]

There is a distinction between sections 13 and 14. Under section 13 the court has power to fine an offender convicted on indictment of felony. In such cases the term of imprisonment which can be imposed in default of payment of the fine is limited to 12 months, but no limit is provided under section 14 when the court is dealing with forfeiture of recognisances: see the proviso to section 14 (1).

There are five types of recognisances, (1) to be of good behaviour and come up for judgment, (2) persons on bail, (3) persons bound to prosecute and give evidence who come within section 31 of the Criminal Law Act, 1826, (4) persons bound to keep the peace, and (5) persons bound to prosecute at quarter sessions.

[DONOVAN J. A man who had failed to surrender to his bail might be acquitted at his trial but ordered to serve six months' imprisonment if he fails to pay.]

It is submitted that section 14 does not apply to such a case at all. If it did, it would give the court wide powers over persons not previously subject to imprisonment.

[DONOVAN J. For the purpose of the Criminal Appeal Act, 1907, the only question is: Was this a sentence passed on conviction?]

[LORD PARKER C.J. Before we construe section 14 of the Act of 1948 we must consider the court's jurisdiction under section 3 of the Act of 1907.]

Section 3 provides that a person convicted on indictment may appeal to this court (*c*) against the sentence passed on his conviction, and by section 21 the expression "sentence" includes "any order of the court made on conviction." In *Rex* v. *London Quarter Sessions, Ex parte Beaumont*[2] the Divisional Court held that the words "any order made on conviction" in section 36 (2) of the Criminal Justice Act, 1948, meant any order made as a consequence of conviction. To succeed, the appellant must show that "on conviction" means "at the same time." *Beaumont's* case[2] can only be distinguished on the ground that it was decided under a different Act of Parliament.

[LORD PARKER C.J. The only point which the court has in mind is whether the definition of "sentence" in section 21 of the Act of 1907 is an inclusive one. It could be said that no appeal will lie unless it covers this case.]

Harold Cassel for the Crown. No appeal lies to this court against the order of the deputy chairman. This was not a sentence passed on conviction within the meaning of sections 3 and 21 of the Criminal Appeal Act, 1907. This case is indistinguishable from *Rex* v. *London Quarter Sessions, Ex parte Beaumont.*[2]

LORD PARKER C.J. This appellant, together with two other men, pleaded guilty at London Sessions to office-breaking and larceny, and he was sentenced to three years' imprisonment. Apparently he was on bail at the time of his trial and he failed to

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[2] [1951] 1 K.B. 557; [1951] 1 T.L.R. 258; [1951] 1 All E.R. 232.

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surrender, and in sentencing him to three years' imprisonment the chairman said: "For this offence I think the appropriate "sentence is that you go to prison for three years; your recognis-"ance will be estreated; and you will have to report within the "provisions of the Criminal Justice Act." Later on that day he said, addressing the appellant: "Harman, I estreated your recog-"nisance of £100 this morning, but I omitted to tell you what the "alternative is if you do not pay. The alternative is a further "six months, to be consecutive upon the three years to which I "sentenced you."

The appellant now appeals to this court, not against his sentence of three years' imprisonment, but against what he says is a sentence of six months' imprisonment consecutive upon the three years if he does not pay the £100. As is well known, the jurisdiction of this court is limited by the Criminal Appeal Act, 1907, and, in regard to sentences, the jurisdiction is given by section 3 in the following terms: "A person convicted on indict-"ment may appeal under this Act to the Court of Criminal "Appeal— . . . (*c*) with the leave of the Court of Criminal Appeal "against the sentence passed on his conviction, unless the sen-"tence is one fixed by law." By section 21 of the same Act, the definition section: "The expression 'sentence' includes any "order of the court made on conviction with reference to the "person convicted. . . ."

On that, Mr. Bruce, for the appellant, says that whatever may have happened in any other case, in the present case the order of six months' imprisonment was an order of the court made on conviction, that is, at or about the time of conviction and with reference to the person convicted. That, no doubt, is true, but it seems perfectly clear to this court, quite apart from authority, that where the section says "any order of the court made on "conviction," it must mean "made as a consequence of convic-"tion." Indeed, the matter has already come before the Divisional Court in *Rex* v. *London Sessions, Ex parte Beaumont*,[1] in regard to corresponding words in section 36 of the Criminal Justice Act, 1948. That section is in the following terms: "A "person convicted by a court of summary jurisdiction shall have "a right of appeal . . .", and by subsection (2): "For the pur-"pose of the last foregoing subsection, the expression 'sentence' "includes any order made on conviction by a court of summary "jurisdiction. . . ." In *Beaumont's* case,[1] it was held by the

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[1] [1951] 1 K.B. 557; [1951] 1 T.L.R. 258; [1951] 1 All E.R. 232.

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Divisional Court that the words "any order made on conviction" meant any order made as a consequence of a conviction and not an order made at the time of conviction.

The court feels that this is a very plain case and that this sentence of six months' imprisonment had nothing to do with the conviction. It may have been given at the time of and while sentencing the appellant on conviction, but it had nothing to do with the conviction, any more than if he had been acquitted and the recognisance had been estreated and a period of imprisonment ordered in default of payment. Accordingly, there is no jurisdiction in this court to entertain the appeal and it is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

E. M. W.

C. A.
1959
April 9, 10.

Hodson, Romer and Pearce L.JJ.

HERBERT *v.* HAROLD SHAW LTD.

[1957 H. No. 341.]

Factory—Persons benefited by regulations—"Persons employed"—Independent contractor—Self-employed roofer falling off roof—Failure to provide proper equipment—Whether duty owed to independent contractor under building regulations—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60.

Building—Safety regulations—Application—Independent contractor—Whether applicable to self-employed workman—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 31 (1).

"*Workman*"—*Meaning—Employers and Workmen Act,* 1875 (38 *&* 39 *Vict. c.* 90), *s.* 10.

The plaintiff, a skilled roofer, was engaged on roofing work on a shed which was being erected by the defendants, a firm of roofing contractors, for the National Coal Board, when he slipped, fell and was injured. The plaintiff was a self-employed workman, who had worked exclusively for the defendants for several years before the accident. He was paid sometimes at an hourly rate, sometimes at a piecework rate. He engaged and paid an assistant himself, but charged his assistant's wages to the defendants. For national

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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insurance purposes he paid for his own stamp as a self-employed person and, for tax purposes, he was assessed under Schedule D, as a man running his own business. He brought an action for damages against the defendants alleging, inter alia, breach of the Building (Safety, Health and Welfare) Regulations, 1948,[1] in that they failed to provide proper equipment:—

Held, that no duty was owed to an independent contractor under the Building (Safety, Health and Welfare) Regulations, 1948, and since the plaintiff was outside the master and servant relationship, his claim under the regulations failed.

Decision of Streatfeild J. affirmed.

APPEAL from Streatfeild J., sitting at Nottingham.

On July 19, 1956, the plaintiff, Albert James Herbert, a skilled roofer, was fixing asbestos roofing sheets to the steel framework of a shed, when his foot slipped and he fell over the edge of the roof. The shed was being erected by the defendants, Harold Shaw Ltd., a firm of roofing contractors, for the National Coal Board at Clifton Colliery, near Nottingham.

The plaintiff had been a skilled roofer for many years. Before the war he had been a roofing and tiling contractor on his own account; during the war he was employed by the defendants as a foreman, and after the war he decided that he would be his own master. In the first year after the war he worked occasionally for persons other than the defendants, but for five years before the accident he worked exclusively for the defendants.

The method of payment varied, the plaintiff sometimes being paid at an hourly rate, and sometimes by piecework. He paid and engaged his own assistant himself and charged his assistant's wages to the defendants. On the present job he was paid at the rate of 9s. 1d. per hour, 4s. 1d. being in respect of the wages payable to the assistant. He stamped his own national insurance card as a self-employed person, and for tax purposes he was treated as a man running his own business. An accountant prepared his returns for the purpose of profits under Schedule D. The plaintiff provided no tools other than his own hand tools. The defendants did not supply any equipment, although they had some equipment of their own. The defendants endeavoured to make arrangements with main contractors in their contracts for the supply of safety devices and equipment. On the day of the accident the plaintiff borrowed two ladders, but he could not borrow a plank, which he thought to be necessary to give him a better foothold on the roof.

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[1] Factories Act, 1937, s. 60: "(1) Where the Secretary of State "is satisfied that any manufacture, "machinery, plant, [equipment, ap- "pliance] process, or description of "manual labour, used in factories is "of such a nature as to cause risk "of bodily injury to [the persons "employed], or any class of those "persons, he may, subject to the "provisions of this Act, make such "special regulations as appear to him "to be reasonably practicable and to "meet the necessity of the case."

Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145), reg. 4: "It shall be the "duty of every contractor and em- "ployer of workmen who is under- "taking any of the operations to "which these regulations apply . . . "(ii) to comply with such of the "requirements of regulations 31–33, ". . . as relate to any work, act "or operation performed or about to "be performed by such contractor or "employer of workmen; . . ."

Reg. 31: "(1) Where work is done "on the sloping surface of a roof "and, taking into account the pitch, "the nature of the surface, and the "state of the weather, a person em- "ployed is likely to slip down or off "the roof, then unless he has ade- "quate handhold or foothold or is "not liable to fall a distance of more "than 6 feet 6 inches from the edge "of the roof, suitable precautions "shall be taken to prevent his so "falling."

The plaintiff brought an action against the defendants, claiming damages for the injuries he suffered because of the accident. In his statement of claim he alleged that he was employed by the defendants and relied upon the defendants' negligence at common law and their breach of statutory duty by failing to provide proper equipment as required by the Building (Safety, Health and Welfare) Regulations, 1948.

Streatfeild J. found that there had not been any negligence nor any non-compliance with the Building Regulations of 1948. He further held that, in any event, the plaintiff was an independent contractor to whom no duty was owed in respect of the provision of equipment either at common law or under the Building Regulations of 1948. He therefore dismissed the plaintiff's claim. The plaintiff appealed.

J. R. Bickford Smith for the plaintiff. The definition of "workman" in the Employers and Workmen Act, 1875, applies to the present case, and the plaintiff is a "workman" within the Building Regulations of 1948 because he undertook to do the work personally. He was paid at an hourly rate and instructed to undertake a particular job. The reason for his employment was his personal skill as a craftsman. If he had left the execution of the work to his assistant, he would have been in breach of contract. He was employed for his labour, not for the product of his labour. Guidance can be obtained from the Act of 1875 and from the Employers' Liability Act, 1880, as to the persons whom Parliament intended to protect. The terms used in these Acts are not "master" and "servant" but "employers" and "workmen," and by the use of the latter terms Parliament was extending protection to persons not within the master and servant relationship. The legislation was intended to protect persons who were not subject to supervision and were not, strictly speaking, servants, such as outworkers: see *Squire* v. *Midland Lace Co.*[2]

The Factories Act, 1937, contains no definition of the terms "employer" and "workmen." The realities of the situation must be looked at and regard paid to the substance of the matter. In substance the plaintiff was a manual worker engaged as an individual workman to do a skilled job personally. The real test as to whether he is a "workman" is whether the plaintiff was employed for his own skill. If the definitions of "employer" and "workman" in the Act of 1875 are applicable to the present case, then the plaintiff is a workman. Where a contractor in a colliery was employed to make tins, and he was paid sometimes according to the number he made and sometimes by timework, he was held to be a workman for the purposes of the Act of 1875: *Pillar* v. *Llynvi Coal and Iron Co. Ltd.*[3] Reliance is placed particularly on the dicta of Lindley J. in *Grainger* v. *Aynsley & Co.*[4] and of Pollock C.B. in *Sleeman* v. *Barrett.*[5] [Reference was also made to *Stuart* v. *Evans*[6] and *Ingram* v. *Barnes.*[7]]

Marven Everett Q.C. and *A. E. James* for the defendants. The Act of 1875 has nothing to do with the present issue. The general law is that of contract. The Act of 1875 creates certain exceptions to the general law, but in each case it is imported specifically into an Act of Parliament. The definition of "workman" in the Act of 1875 was imported specifically into the Truck Amendment Act, 1887, and the Employers' Liability Act, 1880. Unless the definition is imported in such a manner, it does not apply. The Act of 1875 was not concerned with safety, and it would be unsound to import a definition in an Act which has nothing to do with the objects of the statute under consideration.

The Factories Act, 1937, deals with four classes of persons—owners, occupiers, persons employed, and, in certain sections, any persons employed. The reference in section 60, under which the Building Regulations are made, is to "the persons employed"; it is not to "any persons employed." Section 26 of the Act of 1937 imposes a duty to provide safe means of access for "any "person" employed, and it has been held that the duty was owed to a window cleaner who was himself an independent contractor: *Lavender* v. *Diamints Ltd.*[8] But regulation 5 of the Building Regulations, which imposes a duty to provide scaffolds, is confined to the employees of the contractor, and could not avail a clerk of works supervising a contractor's building of a school: see *Wingrove* v. *Prestige.*[9]

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[2] [1905] 2 K.B. 448; 21 T.L.R. 466.

[3] (1869) L.R. 4 C.P. 752.

[4] (1886) 6 Q.B.D. 182. 188.

[5] (1864) 33 L.J.Exch. 153, 154, 155.

[6] (1883) 49 L.T. 138.

[7] (1857) 7 E. & B. 115.

The Building Regulations impose duties on both contractors and employers of workmen. In the present case both the plaintiff and the defendants "were undertaking . . . operations to "which these regulations apply" within the meaning of regulation 4. Both, therefore, had a duty to each other's servants, and, if the plaintiff's assistant fell, he could proceed against both: *Mulready* v. *Bell.*[10] As a matter of construction the only person owed a duty under the regulations was the plaintiff's assistant. The plaintiff here was clearly an employer of workmen. It is difficult to see how at the same time he could be "a person "employed." But that is what he must establish if he is to succeed in his claim. If the plaintiff could be an employer of workmen and a person employed at the same time, he would be placed in an impossible position under regulation 4.

Supposing both the plaintiff and his assistant fell. It would be a very bold course to say that the sub-contractor as an employer of workmen was himself under a duty and therefore guilty of a statutory offence, but that at the same time he could take off his wolf's clothing of a guilty employer and assume the sheep's clothing of an injured employed person. If there were to be such a case, the defence of ex turpi causa non oritur actio would probably apply: see *Massey-Harris-Ferguson* (*Manufacturing*) *Ltd.* v. *Piper.*[11] Looking at the pattern of the regulations, it is clear that "the persons employed" in the regulations means persons employed under a contract of service so as to be within the master and servant relationship. The plaintiff was not under a personal obligation to do the work, for he could have sub-contracted this contract to someone else: see on this *Davies* v. *Collins.*[12]

Bickford Smith in reply. Reliance is placed on *Edwards* v. *Newland,*[13] particularly on the judgment of Tucker L.J.,[14] for the view that the contract in the present case was one of personal skill and such that it could not be performed by someone else.

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[8] [1949] 1 K.B. 585; 65 T.L.R. 163; [1949] 1 All E.R. 532.

[9] [1954] 1 W.L.R. 524; [1954] 1 All E.R. 576.

[10] [1953] 2 Q.B. 117; [1953] 3 W.L.R. 100; [1953] 2 All E.R. 215.

[11] [1956] 2 Q.B. 396; [1956] 3 W.L.R. 271; [1956] 2 All E.R. 722.

[12] (1945) 61 T.L.R. 218; [1945] 1 All E.R. 247.

[13] [1950] 2 K.B. 534; 66 T.L.R. (Pt. 2) 321; [1950] 1 All E.R. 1072.

[14] [1950] 2 K.B. 534, 537.

HODSON L.J. referred to the facts and continued: Streatfeild J. stated his conclusion as follows: "I do not think that it can be "said on those facts that [the plaintiff] was a person who, being "a craftsman, has entered into, or works under, a contract with "an employer, that being a contract personally to execute any "work or labour. That that was the hope and the expectation I "have no doubt, but that it was the contract I do not think is "proved. For that reason, therefore, I do not think that any "contract of employment, either for service or for services, ever "came into existence, quite apart from their hope and expectation, and indeed their practice. I think that at all material "times [the plaintiff] was carrying on as he preferred to carry "on, namely, as an independent contractor."

Having come to that conclusion of fact, the judge came to the further conclusion that the plaintiff, who was in the habit of working on a roof and making his own arrangements for borrowing ladders and any necessary boards he might require and finding his own tools, was not in a position to say, because he fell off a roof, that the defendants were liable either at common law or under the building regulations for breach of any regulations designed for the safety of workmen.

That conclusion is, I think, quite unassailable, but it has been attacked in this court on the basis that sufficient regard was not had to the definition of "workman" contained in the Employers and Workmen Act, 1875, which was an Act "to enlarge the "powers of county courts in respect of disputes between employers "and workmen," and contained the following definition in section 10: "The expression 'workman' . . . means any person "who, being a labourer, servant in husbandry, journeyman, "artificer, handicraftsman, miner, or otherwise engaged in "manual labour, whether under the age of twenty-one years or "above that age, has entered into or works under a contract with "an employer, whether the contract be made before or after the "passing of this Act, be express or implied, oral or in writing, "and be a contract of service or a contract personally to execute "any work or labour." It is submitted that that definition has application to the present case, and the judge, without ruling upon that, dealt with the case on the footing that that definition might apply. In the passage which I have read, he found the facts, which are justified by the evidence, which would cause this action to fail even if this definition applied. Having regard to the way the case has been dealt with, I think it is our duty to point out that that Act has no direct bearing on the present case at all. The definition is expressed to be a definition of "workman" in this Act, and it was applied expressly in other Acts of Parliament, not only in the Truck Amendment Act, 1887, but also in the Employers' Liability Act, 1880; but it was not applied in the Factories Act, 1937, under which the building regulations in question here were made. The expression "workman" as such, so far as our researches have gone, does not appear at all in the Factories Act, 1937, although it does appear in the building regulations. It does not, therefore, have a direct bearing on this case that, for the purposes of particular legislation, the word "workman" has been defined.

I think the question is a very simple one and does not necessarily depend, for example, on whether this man had to do the work himself. Some contracts with independent contractors have to be performed by the man himself with whom the contract is made. It is immaterial whether the plaintiff was expected to work on the site himself or whether he could have left his assistant in his place if it was not convenient for him to be there. The contract was essentially not a contract for work, but a contract for the results of the work, which is an expression used in one of the authorities. The fact that he was paid by the hour seems to me not to throw any doubt on the view which I have expressed. He was paid by the hour at the standard rate at the material time, and the defendants allowed him to add in his bill against them the wages which he paid to his assistant. The contract between the plaintiff and the defendants was, however, a perfectly straightforward contract between independent contractors, and no question of employer and employee or master and servant arises. In that state of affairs, the plaintiff had no possible claim against these defendants for his unfortunate accident, and, to be fair to him, he has never in his evidence blamed the defendants for the casualty which befell him on this day. I think this appeal fails and should be dismissed.

Romer L.J. I entirely agree, and I only wish to say it is my view also, as my Lord has said himself, that no assistance is to be derived in the present case from the definition of "workman" in section 10 of the Employers and Workmen Act, 1875. I think the question has to be decided as a question of construction of the Factories Act, 1937, and the regulations made under that Act, and the definition in the Act of 1875 is of no assistance in the elucidation of the problem.

PEARCE L.J. I agree. The judge considered carefully the arguments and evidence put forward on behalf of the plaintiff and came to the conclusion that the alleged duty was not owed. In my view, there can be no criticism of the result at which he arrived. He investigated the matter on the hypothesis that the plaintiff was right in arguing that the definition of "workman" in the Employers and Workmen Act, 1875, was applicable, but I do not understand him to have accepted that hypothesis as correct; nor do I think that that hypothesis is correct.

For the reasons which Hodson L.J. has given more fully I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Helder, Roberts & Co. for Fidler & Pepper, Sutton-in-Ashfield, Notts; Hewitt, Woollacott & Chown for Browne, Jacobson & Roose, Nottingham.*

REGINA *v.* JUDGE SIR SHIRLEY WORTHINGTON-EVANS.
Ex parte MADAN AND ANOTHER.

1959
April 30;
May 12.

Lord Parker C.J., Donovan and Salmon JJ.

County Court—Practice—New trial—Successive applications for new trial—Judgment given in absence of defendant—Judgment set aside on terms—Terms not complied with—Proceedings transferred and judgment summons issued in other county court—Application for new trial on ground of fraud—Jurisdiction of judge of court to which proceedings transferred to order new trial—Whether application under Order 37, *r.* 2, *exhaustive of jurisdiction to order new trial—Whether jurisdiction under Order* 37, *r.* 1, *to order new trial—County Courts Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 95*—County Court Rules,* 1936 (*S.R. & O.* 1936, *No.* 626), *Ord.* 25, *r.* 48; *Ord.* 37, *rr.* 1, 2.

Crown Practice—Certiorari—Inferior tribunal—County court—Whether certiorari will lie to quash order of county court judge made without jurisdiction.

Plaintiffs brought two actions in the Bloomsbury County Court against the defendant, claiming, in the first action, possession of certain premises and mesne profits, and in the second action damages for alleged conversion of goods at the premises. No defence was put in and on July 8, 1958, the judge, after hearing evidence, gave judgment for the plaintiffs. On July 24 the defendant applied to the judge that the judgments be set aside and new trials be ordered

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on the ground that he had not been represented at the hearing owing to a misunderstanding as to the date. The judge (acting under rule 2 of Order 37 of the County Court Rules, 1936 [1]) granted the application on terms that the defendant paid into court on or before October 1 a sum of money in each action. The terms were not complied with and the plaintiffs issued judgment summonses in the Clerkenwell County Court, the court having jurisdiction for the defendant's address, pursuant to Order 25, r. 48. The defendant gave notice that he intended to apply to the court in each action to grant him "each and every form of relief necessary to defeat "fraud." That application was heard by the judge of the Clerkenwell County Court on December 18, 1958, who, after an affidavit sworn by the defendant had been read, made orders (under rule 1 of Order 37) that the judgments in the actions and all subsequent proceedings thereon be set aside and new trials be had between the parties. On an application by the plaintiffs for an order of certiorari to quash the orders of December 18, 1958, on the ground that the judge of the Clerkenwell County Court had had no jurisdiction to make them:—

Held, (1) that rules 1 and 2 of Order 37 of the County Court Rules, 1936, did not designate the individual judge who tried the case as the only judge with power to order a new trial, and that where proceedings were transferred under Order 25, r. 48, the judge of the court to which the proceedings had been so transferred had jurisdiction in a proper case to order a new trial. It was irrelevant, therefore, that the orders of December 18, 1958, had been made by the judge of the Clerkenwell County Court and not by the judge of the Bloomsbury County Court who had tried the original actions.

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[1] County Courts Act, 1934, s. 95: "Every judgment and order of a "county court shall, except as pro- "vided by this or any other Act or "county court rules, be final and "conclusive between the parties."

County Court Rules, 1936, Ord. 37, r. 1: "(1) The judge shall in every "case have the power to order a new "trial to be had upon such terms as "he thinks reasonable, and in the "meantime to stay the proceedings."

R. 2: "(1) Where a defendant to "an action . . . does not appear at "the hearing and a judgment or order "is given or made against him in his "absence, the judgment or order and "any execution thereon may on "application be set aside and a new "trial may be granted. . . . (3) The "application shall be made to the "judge if the judgment or order was "given or made by the judge and in "any other case to the registrar."

R. 3 (1): "Where in a default "action judgment is entered in default "of delivery of a defence . . . and the "defendant satisfactorily explains his "default and satisfies the court that "he has a defence . . . which "ought to be heard, the court may, "on application made on notice, set "aside the judgment and execution "thereon . . ."

Ord. 25, r. 48: "(1) Where a "judgment creditor desires to issue a "judgment summons in a court other "than the court in which the judg- "ment or order was given or made "... (2) The judgment creditor may "make an ex parte application . . . "to the court in which the judgment "or order was given or made for the "transfer of the proceedings to a "court having jurisdiction to issue the "judgment summons and to be named "in the application. (3) On receipt "of the application the registrar shall "(*a*) make an order transferring the "proceedings to the named court; ". . ."

(2) That rule 2 of Order 37 dealt with the specific case of a judgment given in the absence of a defendant, whereas under rule 1 there was a general power to order a new trial, and that although, once an application for a new trial had been allowed or refused under a particular provision, no further application could be entertained under the same provision (so that once the application for a new trial had been granted on terms by the Bloomsbury County Court judge no second application under the same rule 2 could be granted), the exercise of jurisdiction under rule 2 was exhaustive of the jurisdiction under that rule only, and not of the jurisdiction arising in different circumstances under rule 1; accordingly, the judge of the Clerkenwell County Court had jurisdiction to make the orders in question and the plaintiffs' application must be refused.

Moxon v. *London Tramways Co.* (1888) 57 L.J.Q.B. 446; 36 W.R. 668 (affirmed C.A., 37 W.R. 132; sub nom. *Reg.* v. *Greenwich County Court Judge and Moxon*) and *Great Northern Railway Co.* v. *Mossop* (1855) 17 C.B. 130 considered.

In a proper case the High Court has power by certiorari to bring up and quash the order of a county court judge made without jurisdiction in that behalf.

APPLICATIONS for orders of certiorari and prohibition.

The applicants, Bhupinder Singh Madan and Gurmail Singh Sooch (hereinafter called the plaintiffs), plaintiffs in two actions commenced in the Bloomsbury County Court against the respondent, Vaidymath Shastri Sharma (hereinafter called the defendant), by plaints Nos. O. 745 and O. 746, sought an order of certiorari to bring up and quash two orders dated December 18, 1958, made by Judge Sir Shirley Worthington-Evans in Clerkenwell County Court whereby the judge ordered that the judgments in the two actions and all subsequent proceedings thereon be set aside and that new trials be had between the parties on March 9, 1959. The plaintiffs also sought an order of prohibition directed to Judge Sir Shirley Worthington-Evans and to the defendant prohibiting them from further proceeding in the actions.

The following statement of facts is taken from the judgment of the court. Plaint No. O. 745 was for recovery of possession of some premises at 137, Whitfield Street, London, of which the plaintiffs had given a tenancy to the defendant, which they claimed had been duly determined by notice. There was also a claim for mesne profits. Plaint No. O. 746 was for £20 damages for alleged conversion by the defendant to his own use of goods belonging to the plaintiffs at the same premises. After the defendant had unsuccessfully sought an injunction in the Chancery Division against being excluded from the premises by the plaintiffs, the two actions came on for hearing in the

Bloomsbury County Court on July 8, 1958, before Judge Alun Pugh. No defence had been put in by the defendant and he did not appear and was not represented. After hearing evidence the judge gave judgment for the plaintiffs, in the first action for £130 mesne profits, the defendant having quit the premises on May 25, 1958, and for £20 damages in the second action. He awarded costs to the plaintiffs.

On July 24, 1958, the defendant applied to the same county court judge for orders that the two judgments of July 8, 1958, be set aside and that new trials be ordered. The application was made on the ground that the defendant was not represented at the hearing on July 8 owing to a mistake as to the date of the hearing. The judge granted the application on terms that the defendant pay into court the sum of £90 in the first action and the sum of £10 in the second action. It was a further term that the defendant also paid into court the amount of the plaintiffs' taxed costs to date. These payments were to be made on or before October 1, 1958. The defendant failed to do this. None of these sums were paid into court by that date or at any time thereafter. Two judgment summonses were thereupon issued in the Clerkenwell County Court (the court having jurisdiction for the defendant's current address), and after one adjournment these summonses were due to be heard on December 18, 1958. On December 10 the defendant gave notice to the plaintiffs that he intended to apply to the court in each action to grant him "each and every form of relief necessary "to defeat fraud."

That application was heard by Judge Sir Shirley Worthington-Evans on December 18, 1958, when the defendant was represented by counsel. An affidavit sworn by him was read to the effect that he had been defrauded by the plaintiffs in that as they well knew they had no right or title to grant him the tenancy of the premises in question and that they had therefore obtained an advance payment of rent from him amounting to £104 by fraud. The judge ordered (as set out above) that the judgments in the actions and in all subsequent proceedings thereon be set aside and that a new trial be had between the parties.

The plaintiffs sought an order of certiorari in respect of those orders on the ground that the judge exceeded his jurisdiction and had no power to make the orders. They contended (1) that the orders of Judge Alun Pugh dated July 24, 1958, were final and conclusive and could not be reversed except on appeal;

that after the making of those orders no further order could be made setting aside the judgments except on appeal and that the effect of the orders dated December 18, 1958, was to reverse the orders of July 24, 1958; and (2) that if, contrary to their contention, any county court judge had jurisdiction to make further orders setting aside the judgments after the defendant had failed to comply with the terms of the orders of July 24, 1958, the only judge who had such jurisdiction pursuant to Order 37, rule 2, of the County Court Rules, 1936, was Judge Alun Pugh.

A. J. Balcombe for the plaintiffs. The orders made by the judge of the Bloomsbury County Court on July 24, 1958, were final and conclusive and the judge of the Clerkenwell County Court had no jurisdiction to set them aside and order new trials. By section 95 of the County Courts Act, 1934, every judgment and order of a county court "shall, except as provided by this "or any other Act or county court rules, be final and conclusive "between the parties." There is power under Order 37, rules 1, 2 and 3, of the County Court Rules, 1936, to order a new trial in certain circumstances, but the rules contemplate an application to "the judge" (see, in particular, rule 2 (3)) who tried the original action, and it is submitted that he is the only judge with power to order a new trial. If, therefore, there was any jurisdiction to order a new trial for the second time, the only judge who had jurisdiction to do so was Judge Alun Pugh at Bloomsbury County Court.

But it is submitted that no judge had jurisdiction to make the orders in question. Once a judgment has been set aside and a new trial ordered, the judge is functus officio and no second application for a new trial can be entertained: see *Great Northern Railway Co.* v. *Mossop*,[2] approved, although distinguished on the ground that in fact the judge had not finally adjudicated upon the application, in *Reg.* v. *Greenwich County Court Judge and Moxon*.[3] Here, as in *Great Northern Railway Co.* v. *Mossop*,[4] the order made by the judge was final, and it was not competent to any judge to re-hear the case. The effect of the order made by the judge of the Clerkenwell County Court was to allow an appeal from the order made by the judge of the Bloomsbury County Court.

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[2] (1855) 17 C.B. 130; 25 L.J.C.P. 22; 4 W.R. 116.

[3] (1888) 37 W.R. 132.

[4] 17 C.B. 130.

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There appears to be no reported case in which certiorari has issued to bring up and quash the order of a county court judge, but it is submitted that where such an order is made without jurisdiction certiorari will lie: see *Kemp* v. *Balne*,[5] where Williams J.[6] distinguished that case from cases where an excess of jurisdiction was complained of. The power of this court to issue certiorari is unaffected by the limitation in section 104 of the County Courts Act, 1934. [Reference was also made to section 111 (1) of the Act of 1934.] If in fact a judge has gone outside the jurisdiction given him by statute, a statutory limitation of the right to certiorari has no application: see *Colonial Bank of Australasia* v. *Willan* [7] and *Ex parte Bradlaugh*.[8]

R. J. Trott for the defendant. There was jurisdiction under Order 37, r. 1, in the judge of the Bloomsbury County Court to set aside his own judgment and order new trials on the second application on the ground that fresh evidence had come to light after the trial which showed that the judgment had been obtained by fraud: see The County Court Practice, Ord. 37, r. 1, note (6), "Fresh evidence" (1958, p. 521).

[LORD PARKER C.J. But in *Moxon's* case [9] the only reason why the court held that the judge was not functus officio was that he had not finally adjudicated upon the application but had adjourned it.]

In *Moxon's* case [9] the judge, at the time when he adjourned, was unaware of all the facts and of the grounds for the application; in this case the fresh facts and the grounds of the second application did not come to light until after the judgment on the first application. *Moxon's* case [9] should therefore be distinguished, for here the second application for a new trial was made on different grounds and in entirely different circumstances from those of the first application. An order for a new trial on the ground that the defendant did not appear at the trial is made under rule 2 of Order 37 and is quite different from an order made on a subsequent application granting a new trial on the ground of alleged fraud under rule 1. Had the second application been an application for a variation of the terms in the order made by the judge of the Bloomsbury County Court, the judge would have been functus officio: he would have had no power to entertain a further application under rule 2, but his powers under rule 1 were unaffected by the first application under rule 2. Wills J. in

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[5] (1844) 1 D. & L. 885.
[6] Ibid. 887.
[7] (1874) L.R. 5 P.C. 417.
[8] (1878) 3 Q.B.D. 509.
[9] 37 W.R. 132, C.A.

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Moxon's case[10] in the Divisional Court said[11] that the effect of *Mossop's* case[12] must be confined to a similar state of facts and that it was "no authority for saying that a county court judge "may not entertain a subsequent application on new grounds; "and indeed he ought not to be so limited."

If the judge of the Bloomsbury County Court had jurisdiction to entertain the second application, then by virtue of Order 25, r. 48, the judge of the Clerkenwell County Court had jurisdiction to do so. Rule 48 (3) (*a*) of Order 25 provides that where a judgment creditor applies for the transfer of the proceedings the registrar shall "make an order transferring the proceedings to "the named court." That must mean that proceedings so transferred are transferred for all purposes; that that is so is borne out by the other provisions of the rules, in particular the requirements in paragraphs (4) and (5) as to payments into the court to which the proceedings have been transferred and the provision in paragraph (6) relating to a subsequent transfer.

It is not contended that certiorari would not lie, but the remedy is discretionary. If it is held that the judge of the Clerkenwell County Court did not have jurisdiction to make the orders in question, then it is submitted that this is not a case in which the court should exercise its discretion to grant the remedy, because at no time has there been a hearing on the merits and fraud is alleged which goes to the root of the judgment.

Balcombe in reply. Rules 1 and 2 of Order 37 are alternative. Once a judge has exercised his powers under rule 2 he cannot subsequently act under rule 1. If the rules are not alternative, it would be open to a defendant to make successive applications under each of the first three rules of the Order; the rules were made for the protection of defendants but they should not be allowed to employ delaying tactics or to use them as an abuse of the process of the court. There must be some finality. It is appreciated that the power under rule 1 is more general than that under rule 2 or rule 3, but reliance is placed on the clear statements in *Great Northern Railway Co.* v. *Mossop*[13] and *Moxon's* case[14] that once an application for a new trial has been made and disposed of the judge is functus officio. It is significant that the Act of 1846 (9 & 10 Vict. c. 95) in force when *Mossop's* case[14] was decided contained in sections 89 and 80 respectively provisions equivalent to those contained in the present rules 1 and 2 of Order 37.

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[10] (1888) 57 L.J.Q.B. 446 (sub nom. *Moxon* v. *London Tramways Co.*).

[11] 57 L.J.Q.B. 446, 448, 449.

[12] 17 C.B. 130.

[13] 17 C.B. 130.

[14] 57 L.J.Q.B. 446; 37 W.R. 132, C.A.

Cur. adv. vult.

May 12. LORD PARKER C.J. Donovan J. will give the judgment of the court.

DONOVAN J. read the following judgment of the court in which he stated the facts and continued: The judge, with both parties before him. made orders that the judgments in the actions and in all subsequent proceedings thereon be set aside and that a new trial be had between the parties on March 9, 1959. These are the orders which Mr. Balcombe on behalf of the plaintiffs moves to quash. He says that Judge Sir Shirley Worthington-Evans was without jurisdiction to make them. Alternatively, he argues that if there were any such jurisdiction it resided solely in Judge Alun Pugh, being the county court judge at Bloomsbury who tried the actions originally.

We are satisfied that in a proper case this court has power by certiorari to bring up and quash the order of a county court judge made without jurisdiction in that behalf. (See hereon *Kemp* v. *Balne* [1] and *Colonial Bank of Australasia* v. *Willan*.[2])

We are also satisfied that it is irrelevant that the original actions were tried by the county court judge at Bloomsbury and that the order now under consideration for a new trial was made by the county court judge at Clerkenwell.

Order 37, rule 1, of the County Court Rules, 1936, does say that "the judge" shall have power to order a new trial; and rule 2 of the same order speaks (inter alia) of an application for a new trial under that rule being made "to the judge if "the judgment or order was given or made by the judge and "in any other case to the registrar." But in our view these provisions are not designating the individual judge who tried the case as the only judge with power to order a new trial. The difficulty which would arise upon such a construction in the event that the trial judge died before a new trial was applied for is at once apparent. Order 25, rule 48, dealing with the case of a judgment summons issued in a court other than the court in which the judgment was given (which is the present case) says among other things that: " (2) The judgment creditor may make "an ex parte application in writing to the court in which the

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[1] (1844) 1 D. & L. 885.

[2] (1874) L.R. 5 P.C. 417.

"judgment or order was given or made for the transfer of the "proceedings to a court having jurisdiction to issue the judgment summons and to be named in the application. (3) On "receipt of the application the registrar shall (*a*) make an order "transferring the proceedings to the named court."

We think this is sufficient to give the judge of the court to which the proceedings have been so transferred jurisdiction in a proper case to order a new trial. It may be that the grounds for ordering a new trial will have emerged only after such transfer; and there is nothing in the language of the rules to compel the conclusion that any application for a new trial must be referred back to the court where the original trial was held.

The first order for a new trial in this case which was made on terms by Judge Alun Pugh was made under Order 37, rule 2. This provides: "Where a defendant to an action or matter or "a defendant to a counterclaim does not appear at the hearing "and a judgment or order is given or made against him in his "absence, the judgment or order and any execution thereon may "on application be set aside and a new trial may be granted."

The second application for a new trial was granted by Judge Sir Shirley Worthington-Evans under rule 1 of the same Order, which reads thus: "The judge shall in every case have the power "to order a new trial to be had upon such terms as he thinks "reasonable, and in the meantime to stay the proceedings."

The problem in this case is whether this second order for a new trial could be granted at all, i.e., whether *any* county court judge would have the necessary jurisdiction to do so. It is not really material in this case that the first application was granted on terms which were not fulfilled or that the second application was made to the judge of the county court to which the proceedings were transferred. The question would be the same if Judge Alun Pugh had refused the first application altogether and had granted the second.

Mr. Balcombe's argument is that when once the first application was granted but the terms imposed had not been complied with, no application for a new trial could be granted by another county court judge, the jurisdiction to do so having been exhausted. In other words, under these rules once a new trial has been granted or refused there is an end of the matter. The county court judge (whether it be the original one or not) has become functus officio and is without jurisdiction to grant a second application.

For these propositions reliance is placed first on the County

Courts Act, 1934, which provides, by section 95, that: "Every "judgment and order of a county court shall, except as provided "by this or any other Act or county court rules, be final and "conclusive between the parties."

It is then pointed out that Order 37, rules 1 and 2, have their origin in sections 89 and 80 respectively of the Act of 1846 (9 & 10 Vict. c. 95). Section 80, after conferring power to proceed to trial in the absence of a defendant, went on by the proviso to enact that the "judge in any such case, at the same or any subsequent "court, may set aside any judgment so given in the absence of "the defendant, and the execution thereupon, and may grant a "new trial of the cause, upon such terms . . . as he may think "fit. . . ." Section 89 provided: "every order and judgment "of any court holden under this Act, except as herein provided, "shall be final and conclusive between the parties, but the "judge . . . shall also in every case whatever have the power, "if he shall think fit, to order a new trial to be had upon such "terms as he shall think reasonable, and in the meantime to "stay the proceedings."

It will be seen that section 80 was intended to cover the case where the defendant did not appear. The trial might proceed to judgment in his absence, but if that absence was later found to be, for some reason or another, excusable, a new trial might be granted. Section 89 on the other hand was quite general in its terms, and indeed its concluding words may be wide enough to cover the case contemplated by section 80. The proviso to section 80 was possibly inserted ex majore cautela, and to allay a fear that a defendant who had unavoidably been prevented from attending the court on the day of the trial would never be able thereafter to put his case. However that may be, the position in 1846 was that power to order a new trial was given to the county court judge under two sections of the Act, one dealing with the specific case of judgment given in the absence of the defendant and the other in "every case whatever." The effect of these sections is now reproduced in current legislation by section 95 of the Act of 1934 and by Order 37, rules 1 and 2.

In *Great Northern Railway Co.* v. *Mossop*,[3] decided in 1855, it was held that once a county court judge in the exercise of his discretion under section 89 had refused to grant a new trial, he could not thereafter change his mind on a fresh application under the same section. Willes J., after quoting section 89, said[4]:

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[3] (1855) 17 C.B. 130.

[4] Ibid. 141.

"That is a power to be exercised, not with reference to interlocutory matters, but with reference to the final judgment, "which, unless a new trial is granted, must be considered a "settled matter. Immediately that the judge has exercised his "discretion to grant or to refuse a new trial, the exception to "the general rule is exhausted, and the general rule must prevail. "The decision once pronounced, there ought to be an end of "the matter; especially where the decision has been acted upon, "and the fruits of the judgment reaped."

This case was distinguished in *Moxon* v. *London Tramways Co.*[5] Section 89 of the Act of 1846 was again in point and it was there held on the facts that the first refusal of the judge to grant a new trial was provisional only, and subject to the right which the judge gave to the applicant to renew the same application on a fresh ground. Wills J. said[6]: "He [the county court judge] "reserved to himself a discretion. The time was also in his "control, and he gave leave to the plaintiffs to apply again. "*Great Northern Railway Co.* v. *Mossop*[7] was decided on "the ground that the county court judge had on the second "occasion reversed his original decision on the same grounds, "that is, he went back on his own judgment. The judgments "of the learned judges in that case show that when a judge has "fully exercised his jurisdiction and discretion in a matter, then "the cause is at an end. But that is not so here; and the effect "of *Mossop's* case[7] must be confined to a similar state of facts." In other words, it was held in that case that the judge had not finally determined the matter.

In the case now before the court the county court judge at Bloomsbury granted new trials on terms which were not complied with. The grant, therefore, lapsed and the resulting position for practical purposes is the same as if the application had been refused. The application was made under rule 2 of Order 37, which corresponds to section 80 of the Act of 1846. It seems clear on the authorities I have quoted that no second application for a new trial could be entertained under the same rule 2.

The application before the county court judge at Clerkenwell was made and granted under rule 1 of the order, which corresponds to section 89 of the Act of 1846. There was no previous application under this rule for a new trial in this case. The question, therefore, becomes this: If an application for a new trial under rule 2 is refused, or is granted but becomes inoperative owing to the non-fulfilment of the terms imposed, does that deprive a county court judge of jurisdiction to grant an application for a new trial under rule 1? As to this, it has to be remembered that rule 2 deals with the specific case of a judgment given in the absence of a defendant and with that case alone. It is difficult to understand upon what principle the exercise of jurisdiction in this limited field should extinguish the general power given to the county court judge under rule 1. There is no authority which compels us to this conclusion, the decided cases being authority for this proposition only, namely, that once an application for a new trial is allowed or refused under a particular provision, no further application can be entertained under the same provision. Furthermore, it would be a surprising result and one which Parliament could hardly have intended, namely, that if a defendant in the county court discovers that a judgment had been obtained against him by fraud, he is nevertheless debarred from asking for a new trial simply on the ground that a previous application had been made under a different rule dealing with an entirely different situation. The anomaly would all the more be marked where, as seems to be the case here, the application under rule 2 succeeded, but the applicant was unable to comply with the condition as to payment of money into court. In our judgment there is no ground for holding that the exercise of jurisdiction under rule 2 is exhaustive of the jurisdiction not only under that rule but also under rule 1 as well, and accordingly we refuse the order asked for.

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[5] (1888) 57 L.J.Q.B. 446; 36 W.R. 668.

[6] 57 L.J.Q.B. 446, 448.

[7] 17 C.B. 130.

The application for a writ of prohibition fails for the same reasons.

Applications dismissed.

Solicitors: *David Schayek & Co.; Probyn, Dighton & Parkhouse.*

J. F. L.

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1959
Mar. 11, 12.

Lord Evershed M.R. and Pearce L.J.

[1958 B. No. 415.]

Exchange Control—Proceedings for debt not payable without Treasury permission—Implied term of contract—Bill of exchange—Payment outside United Kingdom—Holders of bills resident outside scheduled territories—Treasury consent to payment of bills not obtained—Action on bills in England by holders—Right of foreign creditor to payment—Exchange Control Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 14), *ss.* 6 (1), 33 (1), *proviso, Sch.* 4, *para.* 4.

The plaintiffs were foreigners, who were the holders in due course of bills of exchange amounting to £8,700, of which the defendants, an English company, were the acceptors. The plaintiffs were resident outside the scheduled territories, and, accordingly, Treasury permission was required by virtue of the Exchange Control Act, 1947,[1] for the payment of the bills by the defendants

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

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[1] Exchange Control Act, 1947, s. 6: "(1) Except with the permission "of the Treasury, no person resident "in the United Kingdom shall, sub"ject to the provisions of this section, "make any payment outside the "United Kingdom to or for the credit "of a person resident outside the "scheduled territories. . . ."

S. 33: "(1) It shall be an im"plied condition in any contract that, "where, by virtue of this Act, the "permission or consent of the Trea"sury is at the time of the contract "required for the performance of any "term thereof, that term shall not "be performed except in so far as the "permission or consent is given or is "not required: Provided that this sub"section shall not apply in so far as it "is shown to be inconsistent with the "intention of the parties that it "should apply, whether by reason of "their having contemplated the per"formance of that term in despite of "the provisions of this Act or for any "other reason. (2) Notwithstanding "anything in the Bills of Exchange "Act, 1882, neither the provisions of "this Act, nor any condition, whether "express or to be implied having "regard to those provisions, that any "payment shall not be made without "the permission of the Treasury "under this Act, shall be deemed to "prevent any instrument being a bill "of exchange or promissory note. (3) "The provisions of the Fourth Sched"ule to this Act shall have effect with "respect to legal proceedings, arbitra"tions, bankruptcy proceedings, the "administration of the estates of "deceased persons, the winding up of "companies, and proceedings under "deeds of arrangement or trust deeds "for behoof of creditors. . . ."

Fourth Schedule, para. 4 (1): "In "any proceedings in a prescribed "court and in any arbitration pro"ceedings, a claim for the recovery of "any debt shall not be defeated by "reason only of the debt not being "payable without the permission of "the Treasury and of that permission "not having been given or having "been revoked. . . . 5.—(1) In any "bankruptcy, in the winding up of "any company or in the administra"tion of the estate of any deceased "person . . . a claim for a sum not

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to the plaintiffs. No such permission was granted. The plaintiffs sued the defendants on the bills of exchange and applied for summary judgment under R.S.C., Ord. 14. Apart from the possible effect of the Act of 1947, the defendants did not dispute their liability on the bills.

The defendants contended that the plaintiffs' claim was defeated, not only by the withholding of Treasury consent, but also by the implied term in section 33 (1) of the Act of 1947, and that therefore the plaintiffs could not bring themselves within paragraph 4 of the Fourth Schedule to the Act, which was limited to cases where the parties had excluded the implied term:—

Held, that paragraph 4 of the Fourth Schedule was not limited in its effect to contracts within the proviso to section 33 (1), but applied also to cases where a term was implied under section 33 (1) itself; accordingly, the plaintiffs' claim was not defeated by reason of Treasury permission not having been given.

Cummings v. *London Bullion Co. Ltd.* [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383 applied.

Decision of McNair J. affirmed.

APPEAL from McNair J., sitting in chambers.

The plaintiffs were a number of foreign individuals carrying on a merchant banking business in Switzerland, known as Lombard Odier et Compagnie. They were the holders in due course of certain bills of exchange amounting to £8,700, of which the defendants, an English company, the Contract and Trading Co. (Southern) Ltd., were the acceptors. There was no special term relating to the contract contained in the bills of exchange.

Since the plaintiffs were resident outside the scheduled territories within the meaning of the Exchange Control Act, 1947, Treasury consent was required to the payment of the bills by the defendants to the plaintiffs, but no such consent was granted. The plaintiffs brought an action against the defendants on the bills of exchange, and applied for summary judgment under R.S.C., Ord. 14. Apart from the effect of the Act of 1947, the defendants did not dispute their liability on the bills of exchange, but they contended that because of the implied term introduced into the contract by section 33 (1) of the Act, postponing

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"payable without the permission of "the Treasury shall, notwithstanding "that the permission has not been "given or has been revoked, be "admitted to proof as if it had been "given and had not been revoked ". . . 6. A debt for the payment of "which the permission of the Treasury is required under this Act shall, "if in other respects it complies with "the requirements of subsection (1) "of section 4 of the Bankruptcy Act, "1914, be allowed to be a good petitioning creditor's debt, notwithstanding the said requirement, if "and to the extent that the debt can "be satisfied either by a payment "into court or by a payment to a "blocked account."

performance of the term relating to payment until Treasury consent was given, no cause of action had yet vested in the plaintiffs; paragraph 4 of the Fourth Schedule to the Act of 1947, which, on the face of it, gave the plaintiffs a remedy, did not, the defendants contended, apply to cases where the contract contained the implied term imported by section 33 (1).

Master Jacob rejected this contention and gave the plaintiffs leave to sign final judgment, the effect of which was that the money had to be paid into court. The defendants appealed to McNair J., the judge in chambers, but he upheld the master's order and dismissed their appeal. The defendants appealed.

Raymond Kidwell for the defendants. This appeal turns on the construction of the Exchange Control Act, 1947. Section 6 is the operative section, which makes it imperative to obtain the permission of the Treasury before any payment can be made to the credit of a person resident outside the scheduled territories. Such permission was not obtained in this case; therefore, having regard to section 33 (1), no payment can be made to the plaintiffs. The issue of the plaintiffs' writ is premature. It was an implied condition of the contract that it should not be enforced until Treasury permission had been obtained. Subsections (1) and (2) of section 33 on their true construction establish that until such permission is obtained the plaintiffs cannot sue. Subsection (3) of section 33 and the Fourth Schedule present difficulties of construction. Paragraphs 1, 2 and 3 of that Schedule deal with cases where judgment has been actually obtained. Paragraph 4 can be reconciled with subsection (1) of section 33. Paragraph 4 does not apply to this case, since it was an implied term of this contract that the permission of the Treasury should be obtained. The views expressed in the judgments of the Court of Appeal in *Cummings* v. *London Bullion Co. Ltd.*[2] on the operation of the Fourth Schedule were obiter and are not binding on this court. In any event section 33 should prevail.

Norman Tapp for the plaintiffs. Paragraph 4 of the Fourth Schedule applies to any debts irrespective of whether the contract falls within the proviso to subsection (1) of section 33 or not. If it is established that the parties agreed that the performance of the contract should not be dependent on Treasury permission, the Act does not make that contract illegal. The court is bound by the decision in the *Cummings* case.[2]

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[2] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.

Section 33 is not only concerned with creditors and debtors, but also deals with every other contract where consent is required under the Act. Part I of the Act deals with the purchase and trading of currency; Part II with the control of payment; Part III with securities; Part IV with the export of currency and goods; Part V deals with miscellaneous items, and Part VI contains the Schedules to the Act. The purpose of section 33 is to provide machinery for implementing Parts I–V of the Act. Section 32 sets up machinery for blocked accounts. Read in that light, the implied term of section 33 legalises contracts which would otherwise be illegal for lack of Treasury consent. If an English resident agrees to pay English currency to a foreigner, section 33 saves what would otherwise be an illegal contract.

[LORD EVERSHED M.R. I am not attracted by the view that the purpose of the proviso is to make lawful what would be otherwise unlawful. There is a common formula for statutes when that is Parliament's intention.]

If it were not for the proviso, the defendants' argument could never have been made.

Looking at paragraph 4 of the Fourth Schedule, there is no limitation whatever on the words "in any proceedings." It has been suggested that there is an inconsistency between paragraph 4 and section 33, but in fact there is none. Section 33 refers to many matters other than the payment of debts. There is no right to damages until the writ is issued. Paragraph 4 does not take away all the effects of section 33, but it does by providing that "a claim for the recovery of any debt shall not be defeated "by reason only of the debt not being payable without the permission of the Treasury" prevent a defendant from relying on the defence that consent has not been given. It takes away a defence which could otherwise be made.

[LORD EVERSHED M.R. The only point is whether the draftsman is distinguishing between a contract where there is an implied term that the debt is not due, and the obscure case where the implied term is excluded. If that distinction has been made, it is odd that under paragraphs 5 and 6 of the Fourth Schedule a foreign creditor could prove in a winding up or in a bankruptcy even though no Treasury consent had been given.]

It would be a strange result that a creditor could prove in winding-up or bankruptcy proceedings in a case where he could not issue a writ. Paragraphs 5 and 6 provide a guide to the construction of paragraph 4.

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In *Cummings* v. *London Bullion Co. Ltd.*[2] the meaning of section 33 and its relationship to paragraph 4 was clearly adverted to by this court. In his judgment Slade J.[3] said that because of section 33 everything was due under the contract except payment. He said that the debt was due on the date fixed by the contract, and that view was based on his reading of section 33. It was therefore within the province of the Court of Appeal to investigate that section, to look at its context in the Act, and also to consider paragraph 4. Mr. Roche took the point in argument that, if consent was not given, the plaintiff was without remedy. In his judgment Romer L.J. said[4]: "I appreciate the "force of Mr. Roche's contention . . . the plaintiff would not "however be wholly without redress." The point having been raised, it was answered by reference to paragraph 4, and that was a deliberate answer to the same point as is taken in the present case. Master Jacob, who heard the present case and gave leave to the plaintiffs to sign summary judgment, was counsel in the *Cummings* case,[5] and he indicated that both paragraph 4 and section 33 were fully explored in argument in that case. It is conceded that the point was not argued in the same form, but the matter was clearly before the court. Denning L.J.[6] based his judgment entirely on his interpretation of section 33 and the Fourth Schedule. This court is bound by its decision in the *Cummings* case.[7]

Kidwell in reply. There is nothing surprising in this debt being provable in bankruptcy proceedings, though it cannot be used to sustain a cause of action until Treasury consent is given. By section 30 of the Bankruptcy Act, 1914, contingent or future debts are provable in bankruptcy proceedings.

[LORD EVERSHED M.R. It is not only a provable claim but provable as if Treasury consent had been given. It is not provable as a contingent debt, but as a debt.]

That is a possible interpretation.

[LORD EVERSHED M.R. That is what the Fourth Schedule says.]

It may be provable, in order to facilitate the settling of the bankrupt's affairs, but that does not affect the date when payment is due, any more than proof of a contingent debt advances the date when payment is due.

Cummings v. *London Bullion Co. Ltd.*[7] is not binding on this point. The only issue decided there was the date of conversion. In the course of argument counsel mentioned difficulties which would arise if a certain date was taken—that does not make the case a binding authority on something which was not a central point of decision. In *Davie* v. *New Merton Board Mills Ltd.*[8] Lord Reid, speaking of something adverted to by Lord Wright in *Thomson* v. *Cremin*[9] about an invitor's responsibility for independent contractors, said: "The shipowner did not seek to "avoid liability either in his pleading or in his case submitted "to this House or in argument in this House because of the "negligence being that of an independent contractor. So there "could be no decision of this House on that matter; it was not "submitted for decision. Therefore there could be no ratio "decidendi, and any observations on that matter must in my "view be regarded as obiter dicta."

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[2] [1952] 1 K.B. 327.
[3] [1951] W.N. 102.
[4] [1952] 1 K.B. 327, 337.
[5] [1952] 1 K.B. 327.
[6] Ibid. 335.
[7] [1952] 1 K.B. 327.

Lord Evershed M.R. This appeal raises a question of the effect, in circumstances which I will mention, of the provisions of the Exchange Control Act of 1947, and more particularly the effect of a decision of this court under that Act in *Cummings* v. *London Bullion Co. Ltd.*[1]

His Lordship stated the facts, and continued: By section 6 (1) of the Act of 1947, which is in Part II, it is provided: "Except with the permission of the Treasury, no person resi-"dent in the United Kingdom shall, subject to the provisions "of this section, make any payment outside the United King-"dom to or for the credit of a person resident outside the "scheduled territories." There is no doubt that, upon its terms, that section applies so as to prevent payment by the defendants, being persons resident in the United Kingdom, to the plaintiffs, who are persons resident outside the United Kingdom, or outside the scheduled territories, unless permission is first obtained from the Treasury; and the fact is that at the present time, for reasons which are not relevant to this matter, the permission has not been granted.

If the matter depended solely on section 6 (1) of the Act of 1947, it would appear that the answer to the suit brought by the plaintiffs against the defendants would be: "We cannot pay "because by an Act of Parliament, which binds us, we are "prevented from making any payment, and indeed it would be

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[8] [1959] A.C. 604, 644; [1959] 2 W.L.R. 331, 358; [1959] 1 All E.R. 346, 367.

[9] [1956] 1 W.L.R. 103n., 110n.; [1953] 2 All E.R. 1185.

[1] [1952] 1 K.B. 327; [1952] 1 T.L.R. 385; [1952] 1 All E.R. 383.

"illegal on the face of section 6 for us to attempt so to do." But certain other provisions of the Act have also been discussed, and I will refer to them.

It should be borne in mind that the Exchange Control Act, 1947, covers a number of transactions; it is not confined merely to cases of contracts to pay sums of money. Thus, in Part III, as Mr. Tapp, for the plaintiffs, pointed out, securities and the issue of securities constitute the subject dealt with, and in Part IV there are restrictions on imports, exports and the like. Part VI of the Act is headed "Supplemental," and I think it true to say broadly of it that it is concerned with the mechanics of the main subject-matter of the Act. Section 33 appears in Part VI, and subsection (1), which has been mainly the subject of debate before us, provides: "It shall be an implied condition "in any contract that, where, by virtue of this Act, the per- "mission or consent of the Treasury is at the time of the contract "required for the performance of any term thereof, that term "shall not be performed except in so far as the permission "or consent is given or is not required."

It will be observed that the terms of section 33 (1) are not confined to the case of a money payment; they cover on their face any case where performance of the term of a contract is one prevented by the terms of the Act save with Treasury permission. Paraphrasing the subsection slightly, it is intended to achieve this, that where the performance of any term—for example, payment of a sum of money—cannot be made without permission, then a term will be implied into that contract that the performance is not to take place until the permission is given. But I would think that the primary object of that subsection is to prevent its being said that, because of this requirement as a condition of the contract, therefore in cases in which permission has not been given, or cannot be obtained, the contract is automatically put an end to; it, so to speak, preserves the contract by reading into it a condition to cover the difficulty created by the Act of 1947.

That being, as I think, the purpose and meaning of section 33 (1), it is not perhaps surprising that a proviso follows in these terms: "Provided that this subsection shall not apply "in so far as it is shown to be inconsistent with the intention "of the parties that it should apply, whether by reason of their "having contemplated the performance of that term in despite "of the provisions of this Act or for any other reason."

Mr. Tapp contended that the proviso was limited in purpose and in effect to saying that a contract on which it was, on the face of it, illegal to pay—and he cites an example of a positive contract in contravention of the Act of 1947—was not converted into a legal contract by section 33 (1).

It is not in the events, as narrated here, necessary for me to express final conclusions on this matter, but since the question has been argued, I ought to say that I am unable, as at present advised, to accept that view of the proviso; I think its natural sense is a rider, and a not unnatural rider, to my construction of the purpose of the subsection. It may, of course, cover the case where, without the proviso, an illegal contract would be made legal. I say no more about that; but if that had been the sole intention, there is a well-known formula in Acts of Parliament which might have been adopted. But I should have thought that it was intended to cover a number of cases where, for example, it would not be right, having regard to the express intention of the parties, to preserve a contract by implying the term stated in the subsection, when the true intent would be that, given the absence of permission, the contract would come to an end; and in that connection I refer to the last five words of the proviso—" or for any other reason."

[His Lordship read section 33 (2) and (3) and continued:] I turn now to the Fourth Schedule. In the copy before me, there appears in the margin " section 33 "; in its opening paragraph, there is a reference to the provisions of Part II of this Act, in which section 33 is not contained, but that is neither here nor there; it says that the provisions of Part II shall apply to sums required to be paid by any judgment, etc. Part II includes section 6, which I have already read, and this and the earlier paragraphs are particularly concerned with the case of a man who has obtained a judgment, and the Exchange Control Act, 1947, comes into operation and provides that it shall have the effect stated when the debt is a judgment debt. I can pass over the first three paragraphs, therefore, and go to paragraph 4, on which particularly Mr. Kidwell has addressed an attractive and forceful argument. Paragraph 4 (1) provides: " In any " proceedings in a prescribed court "—and it may be said that the Supreme Court is such a court—" . . . a claim for the recovery " of any debt shall not be defeated by reason only of the debt " not being payable without the permission of the Treasury and " of that permission not having been given or having been " revoked."

[His Lordship read paragraphs 5 (1) and 6 and continued:]

The argument of Mr. Kidwell is to this effect: He says—and so far there is no doubt that he says rightly—that the contract here sued upon, namely, the bill of exchange, is a contract, the performance of the term of payment whereof requires Treasury permission, and there being no expressed inconsistency of intention, that is made, by implication, a condition of the contract for performance. So, he says, if you look at paragraph 4, it is not true to say that in these proceedings the claim of the plaintiffs for recovery of their £8,700 is defeated by reason *only* of the debt not being payable without permission of the Treasury and of that permission not having been given, but also because the requirement of permission being applicable, it is a term of the contract by implication that until the permission has been obtained the performance is not due.

When Mr. Kidwell first put the point, it seemed to me, I must say, one of attraction, because the formula " by reason only of " the debt not being payable without permission " seems to be something different, at any rate to a lawyer, from a case where by virtue of an express subsection of the Act there is added an implied term of the contract, in reliance on which Mr. Kidwell can say performance is not yet due by the terms of the contract itself.

However, having carefully considered the case, with the assistance of counsel on both sides, and in the light of the general scope and purpose of the Act, and particularly of paragraphs 5 and 6 in the Fourth Schedule, my present view is against the contention of Mr. Kidwell. Having regard to *Cummings* v. *London Bullion Co. Ltd.*,[2] it is not, strictly speaking, necessary that I should express any view of my own; but I do say, though I think the case is not free from difficulty, that my own inclination is that paragraph 4 cannot have been intended to make a fine distinction between what I might call the ordinary case where you do imply a term (in order, as I think, to prevent possible frustration of the contract), and what I should assume to be the rarer case, where the parties to a contract have by express language or otherwise shown that they do not intend section 33 (1) to apply.

I am assisted in my inclination in that direction by the terms of paragraphs 5 and 6; for it would appear to me to be somewhat odd that if Mr. Kidwell's argument is right, a creditor in the position of the plaintiffs here should not be able to invoke paragraph 4 (being in that respect in a worse position than the parties

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[2] [1952] 1 K.B. 327.

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to a contract who have been at some pains to evade the Act), but that he should none the less be entitled to rely, as the terms of the paragraph seem to me plainly to indicate, upon both paragraphs 5 and 6; that is to say, he could rely upon his claim to support a winding-up petition or by way of proof in a winding up, and he could rely upon it in bankruptcy proceedings, though he could not, according to the argument, take any step, under the Schedule, aimed at getting payment into court. In other words, he would be entirely without redress, while at the same time he could rely upon it in these cases under paragraphs 5 and 6. It seems to me that it would appear a strange anomaly; but what I have said a moment ago about being without redress brings in—and this is a convenient stage at which to introduce it—the decision in the *Cummings* case.[3]

It was plainly the view of all three of the judges of this court in the *Cummings* case [3] that where, as here, a person had a money claim, but where the proviso to section 33 (1) had not been brought into operation—namely, when it was an implied term that until permission was obtained, the performance was not strictly due—such an action was not without redress; that he could invoke the provisions of the Fourth Schedule by getting a judgment, the effect of which was to compel payment into court.

That view, to my mind, seems to conform, as I have already indicated, to the tenor of the Act and of the Fourth Schedule, and certainly with the justice of the case, and undoubtedly it was the view which all three of the judges expressed.

For reasons which I will explain presently, it is Mr. Kidwell's submission that those reasons and that view were obiter; they were not a necessary part of the decision, and therefore they do not bind us today; but, first of all, I will state the facts and the point in the *Cummings* case [3] and make my references to the three judgments.

The case was one in which the defendants, a London firm, were liable under a contract of sale to make a repayment in dollars to the plaintiff, an American citizen, upon the return to them of a certain piece of jewellery, a brooch. At the date when the brooch was returned, namely, August 15, 1949, the sum of dollars which was repayable, namely, 3,200 dollars, when converted into sterling at the then rate of exchange was equivalent to £796 0s. 8d. The defendants could not pay then, because they had not obtained Treasury sanction. They did obtain the Treasury sanction some six weeks later on September 29, 1949, but in the interval between those two dates there had been what is commonly called a devaluation of sterling in relation to dollars, so that the amount of dollars, namely, 3,200, translated into sterling on the later date was not £796 0s. 8d., but £1,142 17s., considerably more; and the argument between the parties was: Which was the right figure? The plaintiff sought to recover the larger sum of £1,142 17s.; Slade J. concluded in the defendants' favour that the calculation must be carried out when, according to the terms of the contract, the sum should have been repaid and the brooch had been returned, that is to say, on August 15; but this court held that that was not right, and that when you look at section 33 (1), then the contract itself with its implied terms made September 29 the performance date and not August 15, with the consequence that £1,142 17s. was the right figure.

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[3] [1952] 1 K.B. 327.

It is, however, plain that in the course of the argument the court was invited to consider, and did consider, what on that view was the effect of the Fourth Schedule, which is introduced into section 33 by subsection (3). That invitation arose in this way, counsel for the defendants said: "If Slade J.'s view is wrong—"if, that is to say, the performance date for the purpose of calculating the amount to be paid awaits permission from the "Treasury, then if permission is not obtained, the plaintiff has "no remedy at all and there is nothing he can do; we have in those "circumstances to treat the contract as so amended that he is "left without any redress." To that argument, the court replied: "No, he has redress; he can apply for judgment, and by "the terms of the Fourth Schedule, the date on which the debt "would become payable is the date on which the debtor could "pay the debt into court, namely, as soon as the writ was served "upon him."

That argument will, of course, necessarily carry with it the view that paragraph 4 of the Schedule was applicable in such a case as that which was before the Court of Appeal, namely, the case in which section 33 (1) had implied the term into the contract; in other words, that paragraph 4 was not limited to a proviso case.

All that, I think, is made quite clear if you look at certain passages from the three reserved judgments, and I do so because of the contention of Mr. Kidwell that all this can be disregarded as mere obiter. The leading judgment was delivered by Somervell L.J., who said[4]: "It was rightly pointed out that if a writ "is issued before permission is given a further problem arises if

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[4] [1952] 1 K.B. 327, 335.

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"the judge was wrong in holding that August 15 was the date for "the conversion. The combination of section 33 and Schedule IV "produces a novel position. Until a writ is issued, the person "liable cannot legally make the payment in dollars. Once a writ "is issued, he can legally discharge his obligation by payment "of whatever is the appropriate sum in sterling into court. This "is an obligation created by the statute on the issue of a writ. "We have not to decide that point on this appeal. It was, "however, suggested that it sets a problem incapable of solution, "unless one applies the principle adopted by the judge. . . . "If, however, he pays into court, or if the case goes to judgment, "I at any rate see no difficulty or illogicality in taking the date "when the obligation could have been discharged by a payment "into court as the proper date for conversion."

Denning L.J. dealt with the same point as follows[5]: "The "present is an illustration of a divergence. The cause of action "here arose on August 15, 1949. That is shown by the fact that "at any time thereafter the creditor could have brought an action "in the English courts and recovered judgment: see paragraph 4 "of Schedule IV to the Act of 1947."

Even more specific perhaps for the present purposes is the language of Romer L.J.[6]: "I appreciate the force of Mr. Roche's "contention (which impressed the judge) that on the view above "expressed the defendants, although in possession of the brooch, "would never become liable to repay to the plaintiff the purchase "price if Treasury consent to the payment was withheld. The "plaintiff would not, however, be wholly without redress. The "defendants' inchoate or conditional liability to the plaintiff under "the express terms of the contract is, for many purposes, treated "as a 'debt' by Schedule IV to the Act and sufficiently preserves "the character of a debt to enable the plaintiff to sue; on obtaining judgment in such an action the sterling equivalent of the "money (to be converted, I agree, in accordance with the principle which my Lord has indicated) would be brought into court "and thus kept safely for the plaintiff, who could have then "applied for the consent of the Treasury to payment out to "himself."

It cannot be doubted that all three of the judges applied their minds to this point, and all three must have interpreted paragraph 4 of the Schedule as applicable to a section 33 (1) case. I am quite unable to accept the view that this part of the reasoning

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[5] [1952] 1 K.B. 327, 336.

[6] Ibid. 337.

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of the three Lords Justices can fairly be described as "per "incuriam." It is, of course, quite true—or I will assume it to be true, though the arguments are not reported—that the possibility of limiting paragraph 4 of the Schedule to what I will call a proviso case was not debated or considered. None the less, the court expressed the clearest possible view that paragraph 4 of the Schedule did cover a case of which the present is an example, and that conclusion was one to which the court deliberately came. It is said that it was obiter and was not really the ratio of the decision; but I am not quite sure that I agree with that either. It was apparent that the view that the plaintiff would be, or might be, without redress and that an anomaly would be presented as regards dates unless the earlier date were taken was a ground upon which particularly Slade J.[7] had decided the case as he did in favour of the defendants, and it is at least clear that this court, in arriving at a conclusion in favour of the later date, and to that extent therefore differing from the grounds which had found favour with the judge, went into this question and reconciled the apparent divergence by construing, and pronouncing upon the effect of, the relevant parts of the Schedule. Whether, therefore, it could strictly be described as part of the ratio of the judgments is perhaps less important than the fact that this court undoubtedly did express—and did so deliberately in a reserved judgment—a clear view on the very matter which is now being debated before us.

Mr. Kidwell has referred us to a case in the House of Lords, which has very recently been reported—*Davie* v. *New Merton Board Mills Ltd.*,[8] in which the House dealt among other things with the significance which should be attached to certain language of Lord Wright in a much earlier case, language on which Jenkins L.J.[9] in this court had strongly relied. As appears, for example, from Lord Reid's [10] speech, that noble Lord concluded that what Lord Wright had said ought to be regarded as obiter, as being not necessarily for the particular decision which he was then expressing. Problems of the extent to which particular reasoning is or is not part of the ratio of the decision sometimes do give rise to difficulty; but putting it at its very lowest, the view which this court took of the effect of the Fourth Schedule was undoubtedly part of its reason for being able to differ from the judge as regards the date without creating as a consequence an anomaly or even worse. I therefore feel, in the present case, no doubt that it is the duty of the court on this occasion to follow the reasoning in the *Cummings* case,[11] and that it would create altogether unjustifiable uncertainties in law if we were now to express a quite contrary view in another, and for all practical purposes entirely analogous, situation.

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[7] [1951] W.N. 102.

[8] [1959] A.C. 604; [1959] 2 W.L.R. 331; [1959] 1 All E.R. 346.

[9] [1958] 1 Q.B. 210, 217.

[10] [1959] A.C. 604, 645; [1959] 2 W.L.R. 331, 358, 359.

Whatever, then, be the correct view of the meaning of the Fourth Schedule upon which I have expressed my own inclination, I am quite satisfied that the answer in the present case is that we should regard ourselves as bound to follow the view expressed by this court in the *Cummings* case.[11] That was the view taken by Master Jacob, when the matter first came before him on an application for summary judgment, and it was also the view of McNair J. on appeal from the master. In my view, the master and the judge were both correct in the conclusion at which they arrived, and in conformity with that view it follows that the appeal should, in my judgment, be dismissed.

PEARCE L.J. I agree with all that my Lord has said. Although the matter is not free from difficulty, I do not feel satisfied by Mr. Kidwell's ingenious argument that the joint effect of the words of section 33 and those of paragraph 4 of the Fourth Schedule defeats the plaintiffs' claim in this case. I do not find it easy to accept the view that paragraph 4 of the Fourth Schedule is limited in its effect to contracts within the proviso to section 33 (1), and that it does not affect the contracts coming within the positive provisions of that subsection. But in any event, the joint effect of those words has been considered by this court in reserved judgments in the *Cummings* case.[11] In my opinion we ought, for the reasons that my Lord has given, to consider ourselves in this case bound by the reasoning and the view expressed unanimously in that case. I would therefore dismiss this appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Lipton & Jefferies; Markby, Stewart & Wadesons.*

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[11] [1952] 1 K.B. 327.

MIDLAND SILICONES LTD. *v.* SCRUTTONS LTD.

1959
April 21, 22, 23, 24, 28.

Diplock J.

Shipping—Bill of lading—Discharge—Hague Rules—Limitation of liability—Stevedores engaged by carrier—Action against stevedores for admitted negligence—Whether entitled to protection of limitation—"Carrier"—Carriage of Goods by Sea Act of United States, 1936, *ss.* 1 (*a*), 4 (5)—*Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Sch., Art. IV, r.* 5.

Contract—Implied term—Benefit to third party.

Contract—Parties—Enforcement by third party.

Bailment—Bald or sub-bailment—Stevedores—Possession in goods vested in stevedores by carrier for purpose of unloading—Whether stevedores entitled to benefit of contract between carrier and consignee.

By a bill of lading, which incorporated the United States Carriage of Goods by Sea Act, 1936, and limited to $500 per package the liability of the carrier in the event of loss, damage or delay, a drum containing chemicals was shipped from America to London. The defendants, who were stevedores engaged by the carrier, while lowering the drum from an upper floor of a dock transit shed onto a lorry, negligently dropped and damaged the drum when delivering it to the consignees in accordance with the bill of lading, causing part (worth £593) of its contents to be lost.

The consignees sued the stevedores in tort claiming £593. The stevedores, relying on the bill of lading, claimed that their liability was limited to $500 (£179):—

Held, that there was no principle of vicarious immunity from liability for torts; that the contract of carriage contained in the bill of lading was one to which the defendants were not parties and for which they gave no consideration to the plaintiffs; and, therefore, that the stevedores were not entitled to limit their liability.

Dictum of Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 853; 31 T.L.R. 399; *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.* [1956] 1 Lloyd's Rep. 346 and *Krawill Machinery Corporation* v. *Robert C. Herd & Co.* (1959) (U.S. Supreme Court) not yet reported, applied.

Dicta of Scrutton L.J. in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.* (1925) 21 Ll.L.Rep. 375, 378; and of Denning L.J. in *Smith and Snipe's Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, 514, sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179; *White* v. *John Warrick & Co.* [1953] 1 W.L.R. 1285, 1294; [1953] 2 All E.R. 1021; and *Adler* v. *Dickson* [1955] 1 Q.B. 158, 181; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397 questioned.

Elder, Dempster & Co. Ltd. v. *Paterson, Zochonis & Co. Ltd.* [1924] A.C. 522; 40 T.L.R. 464 explained.

ACTION.

The following facts were agreed:

On or about March 26, 1957, a drum containing chemicals was shipped in New York by Dow Corning Corporation to London on the S.S. *American Reporter* consigned to the order of the plaintiffs, Midland Silicones Ltd., upon the terms of a bill of lading dated March 26, 1957, which incorporated the terms of the carrier's regular long form bill of lading. Clause 1 of the short form provided that its terms and those of the long form "shall govern the relations, whatsoever they may be, between "shipper, consignee and the carrier, master and ship in every "contingency, wheresoever and whensoever occurring and "whether the carrier be acting as such, or as bailee, and also "in the event of, or during deviation or of conversion of the "goods . . ." Clause 3 of the short form (and clause 1 of the long form) provided that: "This bill of lading shall have effect "subject to the provisions of the Carriage of Goods by Sea Act "of the United States, approved April 16, 1936, which shall be "deemed to be incorporated herein . . . The provisions stated "in said Act . . . shall govern before the goods are loaded on and "after they are discharged from the ship and throughout the "entire time the goods are in the custody of the carrier." Clause 3 of the long form provided that: "In this bill of lading "... the word 'carrier' shall . . . include the ship . . . her "owner, operator and demise charterer, and also any time "charterer or person, to the extent bound by this bill of lading, "whether acting as carrier or bailee." Condition 24 of the long form provided that: "In the event of any loss, damage or delay "to or in connection with goods exceeding in actual value 500 "dollars per package lawful money of the United States, or in "case of goods not shipped in packages, per customary freight "unit, the value of the goods shall be deemed to be 500 dollars "per package or per customary freight unit, as the case may be, "and the carrier's liability, if any, shall be determined on the "basis of a value of 500 dollars per package or per customary "freight unit, unless the nature and a higher value shall be "declared by the shipper in writing before shipment and inserted "in this bill of lading. It is agreed that the meaning of the "word 'package' includes animals, pieces and all articles of any "description except goods shipped in bulk."

Condition 4 of the long form provided that: "If the ship is "not owned by or chartered by demise to the United States "Lines Company, this bill of lading shall, with respect to the "carriage, custody and care of the goods while aboard the ship "or on her tackles, have effect only as a contract between the "shipper, consignee and the owner of the ship or demise "charterer, as the case may be, as principal made through the "agency of said company which shall be under no liability "whatsoever for loss of or damage to the goods or with respect "to such carriage, custody and care of the goods. If it shall be "adjudged that the United States Lines Company or any person "other than the owner or demise charterer is the carrier or bailee "of the goods, all rights, exemptions, immunities and limitations "of liability provided by law and all terms of this bill of lading "shall be available to it or such other person." Condition 17 provided (inter alia): ". . . and the carrier and master have the "right to appoint stevedores, master-porters and other agents ". . ."

Section 1 (*a*) of the United States Carriage of Goods by Sea Act, 1936, provides that: "The term 'carrier' includes the "owner or the charterer who enters into a contract of carriage "with a shipper." Section 4 (5) provides that: "Neither the "carrier nor the ship shall in any event be or become liable for "any loss or damage to or in connection with the transportation "of the goods in an amount exceeding 500 dollars per package "lawful money of the United States . . . unless the nature and "value of such goods have been declared by the Shipper before "shipment and inserted in the bill of lading."

The owners of the vessel and the carriers of the drum were United States Lines. At all material times the defendants, Scruttons Ltd., acted as stevedores and agents on behalf of United States Lines in London upon the terms of a stevedoring contract dated August 11, 1952, which provided that: "The "stevedores are to be fully responsible for any damage to vessel "or other property and any damage to or loss of cargo while "being handled or stowed, unshipped or delivered, or while in "stowage, if any damage is caused by any negligence of themselves or their servants. The stevedores to have such protection "as is afforded by the terms, conditions and exceptions of the "Bills of Lading Westbound and Eastbound." The plaintiffs were not at any material time personally aware of the existence or terms of the stevedoring contract.

No declaration as to the value of the drum was at any time made or inserted in the bill of lading pursuant to section 4 (5) of the United States Carriage of Goods by Sea Act, 1936, or Condition 24 of the long form bill of lading.

On April 12, 1957, Neale & Wilkinson & Co. Ltd., the plaintiffs' London forwarding agents, presented the bill of lading of March 26 to the London office of United States Lines, who stamped it with a release stamp asking the defendants, "subject "to safe arrival," to release the goods.

On or about April 14, 1957, the vessel commenced to discharge her cargo at the dock berth alongside D Transit Shed, Royal Victoria Dock. At all material times United States Lines paid an annual rental to the Port of London Authority for the use of the quay and transit sheds at this berth upon the terms of an agreement dated May 7, 1935. On or about April 15, 1957, servants of the defendants discharged the drum from the vessel and transferred it to a place on the upper floor of D shed. On May 1, 1957, H.M. Customs cleared the drum.

On May 3, 1957, the P. L. A. received a delivery note from Neale & Wilkinson & Co. Ltd., the plaintiffs' London forwarding agents, requesting delivery of the drum to Tingle Jacobs & Co., cartage contractors. On the same day the P. L. A., in accordance with normal practice, issued a landing order, addressed to the defendants, to the driver of Tingle Jacobs' lorry, and the driver delivered the landing order to a servant of the defendants who worked in the dock office of United States Lines. Servants of the defendants removed the drum to an opening on the top floor of D shed and prepared to sling the drum down on to the lorry. While the drum was being lowered on to the lorry it was dropped and damaged owing to the negligence of the defendants' servants and some of its contents were lost. The value of the lost contents and the loss sustained by the plaintiffs was £593 12s. 2d.

It was common ground between the parties at the trial that the bill of lading was still in force when the drum was dropped.

Eustace Roskill Q.C. and *R. P. Colinvaux* for the defendants. This is a test case to obtain a decision on whether persons in the position of stevedores are entitled to the benefit of an exceptions clause in a bill of lading when they are, at the material time, performing a part of the carrier's obligation under the bill of lading, namely, to effect delivery of goods to the party entitled to the delivery. It is submitted that: (1) at all material times U.S. Lines were the bailees of the drum from the plaintiffs as bailors; (2) the terms of that bailment are contained in or evidenced by the bill of lading; (3) the bill of lading thus was or evidenced a contract between the plaintiffs and U.S. Lines; (4) that contract was in force between the plaintiffs and U.S. Lines at all material times, including May 3, 1957, when the drum was dropped negligently; (5) Scruttons were at all material times the agents of U.S. Lines to perform certain parts of U.S. Lines' contractual obligations to the plaintiffs, namely, discharge from the ship and later delivery to the consignee; (6) as such agents Scruttons were or became sub-bailees of the drum from U.S. Lines; (7) Scruttons were acting as such agents and/or such sub-bailees and in the course of so acting negligently dropped the drum; (8) U.S. Lines would, if sued, be entitled to limit their liability to $500 or the equivalent in sterling by virtue of the bill of lading; (9) on those facts Scruttons are entitled to the same right of limitation as U.S. Lines would possess if sued; (10) that entitlement arises because (i) the bill of lading plainly contemplates part performance of some of U.S. Lines' obligations by some person or body other than themselves or their servants, as, e.g., by stevedores; (ii) U.S. Lines lawfully sub-bailed the drum to Scruttons for the purpose of Scruttons as the agents of U.S. Lines performing a part of U.S. Lines' obligations under the contract of carriage.

There was no bald bailment of the plaintiffs' goods by the plaintiffs to Scruttons so as to entitle the plaintiffs to sue Scruttons direct and circumvent the provisions of the bill of lading by not giving Scruttons the benefit of the $500 limitation. By clause 4 of the bill of lading Scruttons are entitled as bailees of the goods to the benefits of the bill of lading. Denning L.J. in *Adler* v. *Dickson*[1] said that it must have been the intention of the legislatures adopting the Hague Rules that the benefit of the Rules should extend to masters, crews and stevedores. At no material time did the drum leave U.S. Lines' or Scruttons' possession. Scruttons derived their right to handle the goods and their possession of them from U.S. Lines.

[Reference was made to section 59 of the Port of London Consolidation Act, 1920; section 5 of the Port of London Dock Charges Act, 1923; Second Schedule to the Port of London Act, 1950.]

Doubt has arisen as to the grounds on which *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.*[2] was decided. It is submitted that it decided that where goods are bailed to A on terms that A is not to be liable for his own negligence or the negligence of his servants or agents and the goods are damaged by the negligence of his servants or agents in the course of performing the plaintiff's contract with A, then A's servants or agents (either as sub-bailees or agents) are entitled to the immunity.

[1] [1955] 1 Q.B. 158, 182; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397.

[2] [1924] A.C. 522; 40 T.L.R. 464.

[Reference was made to the evidence in the record of the case.] That was a case where the shipper as bailor gave the cargo to the charterer as bailee, who performed part of the contract of carriage vicariously through the owner, and the owner was held protected.

The analysis of the *Elder Dempster* case [2] in Pilcher J.'s judgment in *Adler* v. *Dickson* [3] should be adopted in its application to the present case; it was reinforced by Denning L.J.,[4] whose view was that the stevedore is entitled to the benefit of the Hague Rules independently of the broader proposition that he is entitled to the benefit of the owner's exception. The principle said by Scrutton L.J. in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*[5] to have been laid down in the *Elder Dempster* case [6] (that, under a contract containing an exemption clause, servants or agents acting under the contract have the benefit of the exemption clause) is correct if limited to contracts of affreightment and bailment.

[The following cases were also referred to: *Hall* v. *Brooklands Auto Racing Club* [7]; *Fosbroke-Hobbes* v. *Airwork Ltd.*[8]; *Cosgrove* v. *Horsfall* [9]; *Smith and Snipe's Hall Farm Ltd.* v. *River Douglas Catchment Board* (*per* Denning L.J.) [10]; *White* v. *John Warrick & Co.* (*per* Denning L.J.) [11]; *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[12]; *The Kite* [13]; *Vita Food Products, Incorporated* v. *Unus Shipping Co. Ltd.*[14]; *Wilson* v. *Darling Island Stevedoring and Lighterage Co.*[15]; *Gilbert Stokes and Kerr Proprietary Ltd.* v. *Dalgety & Co. Ltd.*[16]; *Waters Trading Co. Ltd.* v. *Dalgety & Co. Ltd.*[17]; *A. M. Collins & Co.* v. *Panama Railway Co.*[18]; *United States* v. *The South Star* [19]; *Ford Motor Co.* v. *Jarka Corporation* [20]; *Krawill Machinery Corporation* v. *Robert C. Herd & Co.*[21]; *International Milling Co.* v. *The Perseus and Nicholson Transit Co.*[22]; *Govett* v. *Radnidge.*[23]]

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[2] [1924] A.C. 522.

[3] [1955] 1 Q.B. 158, 162.

[4] Ibid. 182.

[5] (1925) 21 Ll.L.Rep. 375, 378.

[6] [1924] A.C. 522.

[7] [1933] 1 K.B. 205; 48 T.L.R. 546.

[8] (1937) 56 Ll.L.Rep. 209.

[9] (1945) 62 T.L.R. 140.

[10] [1949] 2 K.B. 500, 513, sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179.

[11] [1953] 1 W.L.R. 1285, 1294; [1953] 2 All E.R. 1021.

[12] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[13] [1933] P. 154; 49 T.L.R. 525.

[14] [1939] A.C. 277; 55 T.L.R. 402; [1939] 1 All E.R. 513.

[15] [1956] 1 Lloyd's Rep. 346.

[16] (1938) 81 Ll.L.Rep. 337.

[17] [1951] 2 Lloyd's Rep. 385.

[18] 1952 A.M.C. 2054.

[19] 1954, 1 A.M.C. 418; 210 F. 2d. 44.

[20] 1954, 1 A.M.C. 1095.

[21] Unrep. in Supreme Court, but see [1958] 2 Lloyd's Rep. 159.

[22] [1958] 2 Lloyd's Rep. 272.

[23] (1802) 3 East 62.

There is practically no textbook authority on the question other than Scrutton on Charterparties, 16th ed., p. 286, and Salmond on Torts, 10th and 11th eds., pp. 10–11 (the passage is excised from the 12th edition). Bailment is defined in Pollock and Wright on Possession (pp. 160–163, 169).

[*A. A. Mocatta Q.C.* referred to Carver's Carriage of Goods by Sea, 10th ed., chapter 23.]

On the reasoning of Devlin J.'s judgment in the *Pyrene* case [24] the stevedores would have been protected if they had been sued, because they were all participating in the performance of the contract. U.S. Lines were authorised expressly by the bill of lading to employ stevedores. Some terms have to be implied; it is not difficult to deduce contract or consent. The introduction of condition 17 (and the last sentence in condition 4) of the long form bill of lading supports as a matter of necessary inference or implication that parties other than the immediate parties to the contract are going to have the benefit of, or alternatively be bound by, its terms.

A. A. Mocatta Q.C. and *Michael Kerr* for the plaintiffs. The case must be decided on some legal principle. The cardinal principles applicable are that under the law of England: (1) one who is not a party to a contract, whether express or implied, cannot sue on or by way of defence rely upon the benefit of the contract; (2) for a contract to be valid for the purposes of a claim or defence there must be consideration moving from the promisee.

There are very few exceptions. These are: (i) cases of contracts made by an agent for an undisclosed principal (insurance cases come into this category, which is only an apparent exception); (ii) trusts; (iii) covenants running with land; (iv) Law of Property Act, 1925, s. 56 (1); (v) cases falling within the decision of the *Elder Dempster* case.[25] It is uncertain what is the principle of that case. The better view (based on Jenkins L.J.'s judgment in *Adler* v. *Dickson* [26]) is that it was decided on its own special facts. The alternative is that there was an implied contract between the goods owners and the shipowners (in which case it is not an exception at all). In considering this case it must be remembered that " agency " can either mean (*a*) a contract made between two people through the agency of an intermediary, or (*b*) an " umbrella principle," that if B has a contract with A, and B employs his servant, agent or independent contractor, C, to do part of that contract for him, C is entitled to the same protection as B. A possible (although not admitted) exception (vi) is "the Lord Denning principle," that if a person is mentioned in a contract he can enforce it. If there is such a principle it does not apply in the present case.

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[24] [1954] 2 Q.B. 402.

[25] [1924] A.C. 522.

[26] [1955] 1 Q.B. 158, 195.

Putting the case negatively, in the words of Holmes J. in *A. M. Collins & Co.* v. *Panama Railway Co.*[27]: "There is no "principle of vicarious immunity in the law of tort."

The plaintiffs rely on *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[28] and *Cosgrove* v. *Horsfall.*[29] There is no reason for any difference in principle between the law relating to carriage of persons and goods.

It is submitted that: (1) there was no provision in the bill of lading which expressly purported to cover Scruttons; (2) there is no evidence of a contract between the plaintiffs and Scruttons made through the agency of U.S. Lines; (3) Scruttons were not bailees or sub-bailees of these goods at any time.

Clause 1 of the short form bill of lading is inconsistent with a provision in favour of Scruttons, and Scruttons were not expressly covered by the long form bill of lading. Clause 17 has no application to the facts here; it was not a personal contract as regards employment of stevedores. If U.S. Lines were authorised to make contracts for Scruttons, the stevedoring contract would say so. There is no evidence that U.S. Lines contracted for Scruttons; if they did, what were the terms of the contract?

Scruttons were not bailees, but in any event if it could be shown that there was a contract, bailment is not necessary, and, if not, bailment does not help. There was no contract or obligation on Scruttons to store cargo; all they did was to handle the cargo into and out of a shed, which was not their shed.

At all material times U.S. Lines were bailees of the drum. It is elementary law that to constitute bailment (and sub-bailment) a bailee or sub-bailee must have actual or constructive possession of the goods. Possession must be single and exclusive. Scruttons never had any exclusive possession, but U.S. Lines had it. It was never the intention of U.S. Lines to part with the possession or control. Stevedores engaged in moving goods over a ship or premises of shipowners are not bailees.

[Reference was made to Halsbury's Laws of England, 3rd ed., vol. 2, p. 94, and Pollock and Wright on Possession, pp. 20–21, 59.]

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[27] 1952 A.M.C. 2054.

[28] [1915] A.C. 847; 31 T.L.R. 399.

[29] 62 T.L.R. 140.

Govett v. *Radnidge* [30] is patently irrelevant. The defendants, or one of them, in that case were clearly common carriers. Scruttons may have been officers of U.S. Lines, operating their shed, or their storekeeper.

On the question of the application of the *Elder Dempster* case,[31] there are five possible theoretical explanations of that case: (1) that of Jenkins L.J. in *Adler* v. *Dickson*,[32] that it was decided on its own special facts and decided no question of principle; (2) that of Morris L.J. in *Adler* v. *Dickson* [33] and Fullagar J. in *Wilson's* case,[34] that it was an implied contract of bailment —which until *Adler* v. *Dickson* [35] was the general view held by those practising in the commercial court; (3) the "umbrella" —or American Restatement—principle, which is not backed by authority; (4) the "Lord Denning principle"; (5) orthodox agency.

Considering the facts in the *Elder Dempster* case,[36] it would have been possible to have held that the shipowners were parties to the bill of lading contract with the shipper—in fact were the only party. It was clear that each member of the court regarded the fact that the goods were put on the ship by Elder, Dempster as of no importance.

In the House of Lords, Lord Cave [37] approved a qualified umbrella principle (which only worked if there was some categorical statement that it was intended to apply), which is closer to the Lord Denning principle. Lord Sumner [38] differed from Lord Cave and Lord Finlay and preferred the view that there was an implied contract between Paterson, Zochonis and the owners of the ship, assuming direct bailment from Paterson, Zochonis to the shipowners. It is submitted that in view of the diversity of reasons and the unusual facts no real principle can be extracted from that case.

In the present case there was no bailment at all, still less a direct bailment from the plaintiffs to Scruttons. [Reference was made to *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*[39]] If the umbrella principle is right, it would seem to follow that the servant or agent can sue; but he cannot (*Earl* v. *Lubbock*,[40] approved in *Donoghue* v. *Stevenson* [41]). [Reference was also made to *Waters and Steel* v. *Monarch Fire and Life Assurance Co.*[42]]

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[30] 3 East 62.

[31] [1924] A.C. 522.

[32] [1955] 1 Q.B. 158, 195.

[33] Ibid. 199.

[34] [1956] 1 Lloyd's Rep. 346.

[35] [1955] 1 Q.B. 158.

[36] [1924] A.C. 522.

[37] Ibid. 527.

[38] Ibid. 548.

[39] 21 Ll.L.Rep. 375.

[40] [1905] 1 K.B. 253; 21 T.L.R. 71.

In the *Pyrene* case [43] Devlin J. confused the concepts of the umbrella principle and orthodox agency, distinguishing between assignments of benefits of marine insurance and the undisclosed principal type of case: in insurance cases beneficiaries are parties to the contract. What Devlin J. thought was only explicable on the basis that this was orthodox agency. *Adler* v. *Dickson* [44] is strongly in the plaintiffs' favour. The majority of the court based their decision on orthodox grounds. The appeal in the *Krawill* case [45] has now been dismissed and the effect of the law of the United States and Australia is now that the plaintiff would succeed if this action were brought there. The *Krawill* case [45] is indistinguishable from the present case. [Reference was made to *Allen* v. *Canadian Pacific Railway.*[46]]

The Lord Denning principle (the 6th exception) was stated in *White* v. *John Warrick & Co.*,[47] *Adler* v. *Dickson* [48] and the *Snipes Hall* case.[49] The cases cited in the *Snipes Hall* case [49] (*In re Schebsman*,[50] *Dutton* v. *Poole* [51] and *Prudential Staff Union* v. *Hall* [52]) do not support the statement. If the statement in *White* v. *John Warrick & Co.*[53] is a principle of law, it does not apply in the present case.

It is submitted that U.S. Lines were the bailees throughout, that the defendants fail and should be liable as plain tortfeasors.

Roskill Q.C. in reply. Scruttons gave consideration by their agreement to move the goods as and when directed by the plaintiffs or their agents or U.S. Lines as carriers and deliver them as and how directed. The performance of an act which A has agreed with B to do is good consideration to support a contract with a third person if the latter derives benefit from that performance: *Scotson* v. *Pegg.*[54] [Reference was also made to *Bristol and Exeter Railway* v. *Collins.*[55]]

Cur. adv. vult.

April 28. Diplock J. read the following judgment. This is a test case brought to determine whether stevedores engaged by the shipowner (or carrier), who, in performance of their functions as stevedores, in loading, unloading or delivering cargo, tortiously damage that cargo, can, in an action for tort brought against them by the cargo-owner, rely upon any immunity from or limitation of liability contained in the contract of affreightment made between the cargo-owner and the shipowner (or carrier) by whom the stevedores are engaged.

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[41] [1932] A.C. 562.

[42] (1856) 5 E. & B. 870.

[43] [1954] 2 Q.B. 402.

[44] [1955] 1 Q.B. 158.

[45] Unrep. in Supreme Court.

[46] (1910) 21 Ontario L.R. 416.

[47] [1953] 1 W.L.R. 1285.

[48] [1955] 1 Q.B. 158.

[49] [1949] 2 K.B. 500, 514.

[50] [1944] Ch. 83, 103, 104; 60 T.L.R. 128; [1943] 2 All E.R. 768.

[51] (1677) 2 Lev. 210.

[52] [1947] K.B. 685; 63 T.L.R. 392.

[53] [1953] 1 W.L.R. 1285.

[54] (1861) 6 H. & N. 295.

[55] (1859) 7 H.L.C. 194.

This question has been much debated in this country in the past twenty-five years, but has not yet been authoritatively decided here. In Australia it was authoritatively decided in the negative by a majority judgment of the High Court of Australia in 1956 (*Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[1]). This overruled two earlier decisions by lower courts. In the United States, after considerable litigation, with varying results, it was authoritatively decided in the same sense as recently as last week by a unanimous judgment of the United States Supreme Court in *Krawill Machinery Corporation* v. *Robert C. Herd & Co.*,[2] the reference to which I cannot give.

The facts of the present case (which are agreed) were intended to and, I think, succeed in raising the bald point of principle. The goods in question, a drum containing chemicals, were shipped by the consignors upon a ship owned by U.S. Lines Incorporated for carriage to London, consigned to the order of the plaintiffs, upon the terms of the shipowners' standard bill of lading, dated March 26, 1957, signed on behalf of the shipowners. No declaration of value was made. The bill of lading was forwarded by the consignors to the plaintiffs on April 1, 1957, and the plaintiffs then became, and at all material times thereafter remained, the owners of the drum.

The U.S. Lines had for some years past engaged the defendants (who are a well-known stevedoring company) to discharge their vessels at the Port of London and to act as the U.S. Lines' agents in the delivery of goods to consignees. This was under an agreement between the U.S. Lines and the defendants dated August 11, 1952, which contained a clause stating expressly that the stevedores were to be responsible for any damage to goods caused by any negligence of themselves or their servants, but added: "The stevedores to have such protection as is afforded "by the terms, conditions and exceptions of the Bills of Lading "Westbound and Eastbound."

The drum with which this case is concerned was duly unloaded by servants of the defendants. The plaintiffs, who had not yet obtained customs clearance, were not in a position to take delivery immediately upon discharge, and the drum was stored temporarily in a shed leased by United States Lines from the Port of London Authority. The plaintiffs obtained customs clearance on May 1, 1957, and on May 3 applied to the defendants for delivery. Servants of the defendants in the shed leased by United States Lines then moved the drum to the verandah of the shed and were in process of lowering it to the plaintiffs' lorry, which was on a part of the wharf leased to United States Lines, when they negligently dropped it and caused damage to the amount of £593 12s. 2d., for which sum the present action, based on such negligence, is brought against the defendants.

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[1] [1956] 1 Lloyd's Rep. 346.

[2] Unrep. in Supreme Court, but see [1958] 2 Lloyd's Rep. 159.

In this summary of facts I have omitted, for I do not think them germane to any issue that I have to decide, any detailed reference to the various documents issued or indorsements made by the United States Lines, the Port of London Authority, the defendants and their tally clerk, the plaintiffs and their forwarding agents, and others engaged in the elaborate process of importing a drum of chemicals into the Port of London and on to the lorry of the consignees. It is sufficient to say that the act of lowering the plaintiffs' drum on to the lorry which was negligently performed by the defendants' servants was (1) an act which fell within the scope of the defendants' servants' employment by the defendants, (2) an act which, by the terms of their contract with United States Lines, the defendants had contracted with United States Lines to do, and (3) an act which, by the terms of the bill of lading and the events which happened, United States Lines had contracted with the plaintiffs to do.

The defendants do not dispute that they are vicariously liable for the tortious acts of their servants committed in the course of their employment by the defendants. They contend, however, that they are entitled in the present action to limit their liability to the equivalent of $500 U.S. or £179 1s. and that judgment for no greater sum should be awarded against them.

Since a tortfeasor, and his employer who is vicariously liable for his tort, is in general liable for the full extent of the damage caused by the tort, it is for the defendants to show some principle of law which qualifies this general rule in the present case.

They point, in the first instance, to the bill of lading signed on behalf of United States Lines, which contains the terms of the contract under which the drum was carried. The bill of lading was in a short form, which, however, incorporated the terms of the United States Lines' long form bill of lading. By clause 1 of the short form it was provided that its terms and those of the long form "shall govern the relations, whatsoever they may be, "between shipper, consignee and the carrier, master and ship in "every contingency, wheresoever and whensoever occurring." There is no mention of stevedores. An identical provision appeared in the long form bill of lading.

By the clause paramount, which was clause 3 of the short form, and also by clause 1 of the long form, the provisions of the Carriage of Goods by Sea Act of the United States, 1936, were incorporated, and it was expressly provided that such provisions, with irrelevant exceptions, "shall govern before the goods are "loaded on and after they are discharged from the ship and "throughout the entire time that the goods are in the custody "of the carrier."

The relevant provision of the United States Carriage of Goods by Sea Act, 1936, thus incorporated is that of section 4 (5), namely: "Neither the carrier nor the ship shall in any event "be or become liable for any loss or damage to or in connection "with the transportation of the goods in an amount exceeding "$500 per package lawful money of the United States," unless —as was not the case here—a declaration of value has been made.

Condition 24 of the long form contained a somewhat wider provision, of which the relevant words are: "In the event of any "loss, damage or delay to or in connection with goods exceeding "in actual value $500 per package lawful money of the United "States . . . the value of the goods shall be deemed to be $500 "per package . . . and the carrier's liability, if any, shall be "determined on the basis of a value of $500 per package. . . ."

The United States Carriage of Goods by Sea Act, 1936, like the corresponding United Kingdom Act, contains no definition of "carrier," but provides by section 1 (*a*): "The term 'carrier' "includes the owner or the charterer who enters into a contract "of carriage with a shipper"; and so far as reliance is placed on the incorporation in the bill of lading of section 4 (5) of the United States Carriage of Goods by Sea Act, 1936, no express definition of "carrier" contained in the bill of lading can extend the meaning of the word "carrier" in that subsection.

So far as reliance is placed upon condition 24 of the long form, one must read into that condition the express provisions of condition 3, which provide: "In this bill of lading . . . the "word 'carrier' shall . . . include the ship . . . her owner, "operator and demise charterer, and also any time charterer or "person, to the extent bound by this bill of lading, whether acting "as carrier or bailee." This does not include stevedores unless they are, by some other principle of law, bound by the bill of lading.

It does not, therefore, seem to me that the words either of the Act or of the bill of lading relating to the meaning of the word "carrier" so extend its meaning as to include stevedores engaged by the carrier, and I hold that the bill of lading, upon its true construction, does not purport, by any express words, to "govern the relations whatsoever they may be between the "shipper or consignee" and any stevedores engaged by the carrier. In so far as my so holding depends upon the true construction of the Carriage of Goods by Sea Act of the United States, I have the powerful support of the United States Supreme Court.

In so holding I have not overlooked, although I have rejected, Mr. Roskill's arguments to the contrary based on conditions 4 and 17 of the long form bill of lading, the former of which seems to me to be no more than an elaboration of the well-known English "demise clause," while the latter merely authorises the carrier or master to appoint stevedores and other agents, which he would be entitled to do even if that clause were absent.

The limitation of liability upon which the defendants seek to rely is thus contained, and contained only, in a contract which they did not execute and which does not purport expressly to be made on their behalf. One starts, therefore, with two principles which—regret them though some may—were described by Lord Haldane in a decision binding upon me as fundamental in the law of England.[3] "One is that only a person who is a party "to a contract can sue on it. Our law knows nothing of a jus "quaesitum tertio arising by way of contract. Such a right may "be conferred by way of property, as, for example, under a trust, "but it cannot be conferred on a stranger to a contract as a right "to enforce the contract in personam. A second principle is that "if a person with whom a contract not under seal has been made "is to be able to enforce it consideration must have been given "by him to the promisor or to some other person at the "promisor's request. These two principles are not recognised "in the same fashion by the jurisprudence of certain Continental "countries or of Scotland, but here they are well established."

Either of the principles seems at first sight fatal to the defendants' claim to limit their liability. They were not ostensible or disclosed parties to the contract contained in the bill of lading. That United States Lines had agreed or would agree to engage them to discharge the plaintiffs' goods was unknown to the plaintiffs.

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[3] *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, 853; 31 T.L.R. 399.

To seek to overcome this difficulty by asserting that United States Lines contracted as agents for the defendants as undisclosed principals leads immediately to an insoluble problem as to which of the many terms of the entire contract of carriage were entered into on behalf of the defendants, and what contractual obligations, if any, the defendants undertook by virtue of the bill of lading in relation to the goods. It seems to me to be quite impossible to say that the defendants were ever in any contractual relationship with the plaintiffs as the undisclosed principals of the United States Lines.

If, then, the well-known rule as to the right of undisclosed principals to sue upon a contract made on his behalf is to be regarded as an exception to the first of Lord Haldane's fundamental principles—and he clearly did not so regard it—it does not, in my view, assist the defendants in this case, nor do either of the two well-recognised exceptions, namely, a right to take the benefit of a contract which is conferred by way of property (as, for example, under a trust or by way of assignment) or a right to enforce covenants running with the land, which are in this respect assimilated to proprietary rights.

The defendants, however, contend that there is another exception which covers the present case. The principle relied upon was expressed, in its neatest form, as one would expect, by Scrutton L.J. in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*[4] as follows: "Where there is a contract which contains "an exemption clause, the servants or agents who act under that "contract have the benefit of the exemption clause. They "cannot be sued in tort as independent people, but they can "claim the protection of the contract made with their employers "on whose behalf they are acting."

This was admittedly obiter, but was said by Scrutton L.J. to be the effect of the decision of the House of Lords in *Elder Dempster* v. *Paterson, Zochonis & Co.*[5] If the House of Lords did really lay down this principle (which I may conveniently describe in a phrase borrowed from Holmes J., United States judge, in his dissenting judgment in *A. M. Collins & Co.* v. *Panama Railway*

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[4] (1925) 21 Ll.L.Rep. 375, 378.

[5] [1924] A.C. 522; 40 T.L.R. 464.

Co.,[6] as "vicarious immunity from liability for torts") it disposes of the present case in the defendants' favour. Bankes L.J., however, in *Mersey Shipping and Transport Co. Ltd.* v. *Rea Ltd.*,[7] expressed a different view as to the ratio decidendi of the *Elder Dempster* case.[8]

While I think that Scrutton L.J.'s dictum accurately reflects his own ratio decidendi in his dissenting judgment in the *Elder Dempster* case[8] in the Court of Appeal, I cannot accept that it represents that of the majority of the House of Lords.

The *Elder Dempster* case[8] was one in which the facts were very special. Goods were shipped on a ship owned by Griffiths Steam Navigation Co. and time chartered on a gross time charter by them to Elder Dempster. Mate's receipts were issued in the name of the African Steamship Co. and bills of lading were headed with the names of the African Steamship Co. and the British & African Steam Navigation Co. Ltd., followed by the words "Managers Elder Dempster & Co. Ltd." The body of the bill of lading, which contained no definition of the word "shipowners," expressly stated that its terms and conditions constituted "the contract between the shippers and the shipowners." One bill of lading was signed "P. Bedford, Master," the other "P. Bedford, Agent." It was the master's personal negligence in the stowage of the cargo which caused the damage to the goods. The relevant issue was whether Griffiths Steam Navigation Co., as employers of the master, when sued in tort by the cargo-owning consignors, could rely upon a contractual immunity from liability for damage due to bad stowage conferred upon the "shipowners" by a condition in the bill of lading.

Their Lordships' judgments have been so closely and so recently analysed by Pilcher J. and by the Court of Appeal in England in *Adler* v. *Dickson*,[9] and by the High Court of Australia in *Wilson's* case,[10] with such differing results, that I propose to add as little as possible to the literature on this fascinating topic. I accordingly limit myself to expressing my own and very hesitant view that: (1) Lord Cave's ratio decidendi was, first, that Griffiths Steam Navigation Co. were parties to the contract of carriage, that is, that P. Bedford signed on their behalf as well as on behalf of the charterers. This I call the "express "contract" theory. Alternatively, Lord Cave was prepared to base his decision on the theory of vicarious immunity from liability for torts. (2) Lord Finlay's ratio decidendi was that when the cargo-owners delivered possession of the goods to the Griffiths Steam Navigation Co., an implied contract was thereby made between them and Griffiths Steam Navigation Co. that the latter should carry the goods on the terms of the bill of lading. I call this, for convenience, the "implied contract" theory; but also observe that there are some words in Lord Finlay's speech which suggest that he may, like Lord Cave, have been adopting the express contract theory. (3) Lord Sumner's first and preferred ratio decidendi was the implied contract theory. Alternatively, he suggested that the master, whose negligence was the cause of the damage, was not acting as agent for Griffiths Steam Navigation Co. so as to make them vicariously liable for his negligence. (4) Lord Dunedin agreed with Lord Sumner. (5) Lord Carson agreed with both Lord Sumner and Lord Cave, which gives him four different rationes decidendi.

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[6] 1952 A.M.C. 2054.

[7] 21 Ll.L.Rep. 375.

[8] [1924] A.C. 522.

[9] [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397.

[10] [1956] 1 Lloyd's Rep. 346.

If it be permitted to count heads, three (Lords Dunedin, Sumner and Carson), or if Lord Finlay is included, as probably he should be, four of their Lordships approved the implied contract theory, and three (Lords Sumner, Dunedin and Carson), as second choice, preferred the "master not the servant of the "shipowners" theory. Two (Lords Cave and Carson), or possibly three if Lord Finlay can be included, adopted the express contract theory. Two only (Lords Cave and Carson) adopted the vicarious immunity theory.

I respectfully agree with Jenkins and Morris L.JJ. in *Adler* v. *Dickson* [11] and with Fullagar and Kitto JJ. in *Wilson* v. *Darling Island Stevedoring and Lighterage Co. Ltd.*[12] and with the Supreme Court of the United States that the *Elder Dempster* case [13] is no authority for the principle of vicarious immunity from liability for torts, and that Scrutton L.J. incorrectly stated its effect.

It is, I think, a case which must be read with the warning given by Lord Halsbury in *Quinn* v. *Leathem*,[14] referring to *Allen* v. *Flood*,[15] that "every judgment must be read as applicable to "the particular facts proved, or assumed to be proved, since the "generality of the expressions which may be found there are not "intended to be expositions of the whole law, but governed and "qualified by the particular facts of the case in which such "expressions are to be found . . . a case is only an authority

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[11] [1955] 1 Q.B. 158.

[12] [1956] 1 Lloyd's Rep. 346.

[13] [1924] A.C. 522.

[14] [1901] A.C. 495, 506; 17 T.L.R. 749.

[15] [1898] A.C. 1; 14 T.L.R. 125.

"for what it actually decides. I entirely deny that it can be "quoted for a proposition that may seem to follow logically from "it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge "that the law is not always logical at all."

But to reject Scrutton L.J.'s explanation of the ratio decidendi of the *Elder Dempster* case [16] does not dispose of the case I have to decide. Mr. Roskill seeks, in the first place, to bring it within the implied contract theory, or, failing that, he relies upon statements to be found in some recent cases asserting the existence of a general principle upon which a jus quaesitum tertio arising out of contract is recognised in English law.

As regards the implied contract theory, from what facts is any contract between the plaintiffs and the defendants to be implied? If, as in the *Elder Dempster* case,[16] A invites B to do something to A's goods which B is under no antecedent contractual duty to A to do, it may be reasonable to imply an agreement between A and B as to the terms on which that thing shall be done, and this is so whether or not the invitation is accompanied by a bailment of the goods by A to B, although such a bailment may make it easier to imply a contract. The fact that B is under a contractual duty to C, unenforceable by A, to do that very thing to A's goods does not prevent one implying a contract between A and B, although it may be relevant to the question whether any contract between A and B is to be implied and to its terms, if such a contract is to be implied. Whether or not the implication of such a contract from the special facts in the *Elder Dempster* case [16] was the real ratio decidendi of the majority of the House of Lords, this theory involves no novel principles of law. But it does involve an invitation (which I concede may be an implied invitation) by A to B in his own right to do something to A's goods, and not an invitation to B's principal, C, addressed to C through B as C's agent to accept the invitation.

In the present case, it does not seem to me that the plaintiffs ever invited the defendants to do anything to the plaintiff's goods. They were told by United States Lines to apply to the defendants for delivery of their goods. They did so; that is all. It was United States Lines who requested the defendants to handle the plaintiffs' goods, and United States Lines did so pursuant to their own contract with the defendants, with the object of performing, through the agency of the defendants, United States Lines' own contract with the plaintiffs. It would be flouting reality to suggest that such request to the defendants was made by United States Lines as agents for the plaintiffs, yet if it was not, I can see no ground upon which any contract between the plaintiffs and the defendants can be implied from the mere fact that United States Lines requested the defendants to handle the plaintiffs' goods and to deliver them to the plaintiffs upon the plaintiffs demanding them.

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[16] [1924] A.C. 522.

Mr. Roskill has insisted much that the defendants were sub-bailees of the goods of the plaintiffs at the time when the damage was caused. If the doctrine of sub-bailment is not too esoteric for my understanding, I take this to mean that United States Lines, being then entitled to possession of the plaintiffs' goods, transferred to the defendants such exclusive right of possession as would in the old days have entitled the defendants to sue in trover, and would even today entitle them to be prosecuted for the offence of larceny as a bailee instead of simple larceny. I doubt whether, on the facts, the defendants were ever bailees, whether sub, bald or simple, of the drum of chemicals, but as such possession as they had was given them by United States Lines and not by the plaintiffs, it seems to me quite immaterial whether they were or were not.

Where possession of goods is handed over by the cargo-owner himself (as was assumed to be the case in *Elder Dempster* [16]) the bailment of goods to the person to whom the goods are handed over may, as I have said, be one of the relevant circumstances from which a contract between the cargo-owner and that person may be implied; but I desire to guard myself against any suggestion that when a cargo-owning consignor, who has already made a contract of carriage with a shipowner whereby the shipowner undertakes the loading, delivers his goods to stevedores engaged by the shipowner in order that the goods may be loaded on the ship, any inference can be drawn that possession of the goods is handed over to the stevedores otherwise than as agents for the shipowner or that there is any invitation to the stevedores in their own right to load the cargo-owner's goods from which a contract between cargo-owner and stevedores can be implied.

It remains, finally, to deal with those recent statements of a general principle, laid down principally by Denning L.J., on which Mr. Roskill in the last resort relies. It is convenient to deal with them chronologically. The fountain head (if I may borrow a metaphor from the subject-matter of the case) is the judgment of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board.*[17] In that case (which I will call "the *Snipes Hall* case") the learned Lord Justice enunciates the principle [18] that "a man who makes a deliberate promise which "is intended to be binding, that is to say, under seal or for good "consideration, must keep his promise: and the court will hold "him to it, not only at the suit of the party who gave the "consideration, but also at the suit of one who was not a party "to the contract, provided that it was made for his benefit and "he has sufficient interest to entitle him to enforce it."

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[16] [1924] A.C. 522.

The proviso makes this statement unexceptional and not particularly helpful to the defendants. Even assuming in their favour that the limitation of liability in the bill of lading was made for the defendants' benefit, although the bill of lading does not say so, the question would still remain whether the defendants have "sufficient interest to entitle" them "to enforce it."

What is a "sufficient interest" is not exhaustively defined in the *Snipes Hall* case,[19] but the examples given of the general principle all fall into a number of classes, of which three are covenants running with the land, contracts entered into by agents for undisclosed principals, and contracts entered into by trustees for third parties. So far there is nothing novel, although views might differ whether these three genera belonged to a common species. But there is a fourth class, defined broadly as "promises "expressly made in favour of an interested person."

With the greatest respect, the two twentieth century cases cited in support of the existence of this fourth class do not appear to me to support it, and one, *In re Schebsman,*[20] appears, if anything, to negative its existence, while the seventeenth century case cited, *Dutton* v. *Poole,*[21] which was referred to with approval as late as 1776 in *Martyn* v. *Hind,*[22] was, as I read it, based on the view that natural love and affection of parent for child was good consideration in law, a doctrine which, even if it had not been treated as overruled at least since 1861 (see *Tweddle* v. *Atkinson* [23]), would be of little assistance to the defendants in the present case.

The ground of the actual decision of the majority of the Court of Appeal in the *Snipes Hall* case [24] was that it was a case of a covenant running with the land, and as Denning L.J. himself so held, any exposition of a wider principle was unnecessary and, therefore, obiter.

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[17] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179.

[18] [1949] 2 K.B. 500, 514.

[19] [1949] 2 K.B. 500.

[20] [1944] Ch. 83, 103, 104; 60 T.L.R. 128; [1943] 2 All E.R. 768.

[21] (1677) 2 Lev. 210.

[22] (1776) 2 Cowp. 443.

[23] (1861) 1 B. & S. 393.

[24] [1949] 2 K.B. 500.

Four years later in *White* v. *John Warrick & Co. Ltd.*[25] Denning L.J. treated the *Elder Dempster* case [26] as an example of the general principle to which he had referred in the *Snipes Hall* case.[27] The decision in the *Elder Dempster* case,[28] he said,[29] " was that when a party to a contract has deliberately in " plain words agreed to exempt a third party from negligence, " intending that the third party should have the benefit of the " exemption, he cannot go back on his plighted word and dis- " regard the exemption."

If one disregards the adverb and adjectives, which were, I think, intended to convey moral overtones rather than to qualify the legal principle, which appears to state the broad proposition that where a person has entered into a contract with another, intending to benefit a third person who is not a party to that contract and has expressed that intention in the contract, that third person can sue him on the contract to enforce the benefit, I do not think, for the reasons that I have already given, the *Elder Dempster* case [30] decided any such thing, which seems to me, with respect, to be even wider than the general principle as enunciated by the Lord Justice in the *Snipes Hall* case.[31]

White v. *John Warrick & Co. Ltd.*[32] was a case between the immediate parties to a contract. Denning L.J.'s observations which I have cited were expressly obiter. They are contrary to the opinions of Jenkins and Morris L.JJ. in *Adler* v. *Dickson*,[33] and I should have thought, with great respect, in direct conflict with the decision of the Court of Appeal in *Cosgrove* v. *Horsfall*,[34] where the successful plaintiff had, in plain words, agreed in a contract with the London Passenger Transport Board to exempt the defendant, who was not a party to the contract, from liability.

In the following year, in *Adler* v. *Dickson* [35] itself, Denning L.J. expressed the view that the cases on carriage of goods " undoubtedly show that when a carrier issues a bill of lading for " goods the exception clauses therein enure for the benefit, not " only of the carrier himself, but also for the benefit of the ship- " owner, the master, the stevedores and any other persons who

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[25] [1953] 1 W.L.R. 1285; [1953] 2 All E.R. 1021.

[26] [1924] A.C. 522.

[27] [1949] 2 K.B. 500.

[28] [1924] A.C. 522.

[29] [1953] 1 W.L.R. 1285, 1294.

[30] [1924] A.C. 522.

[31] [1949] 2 K.B. 500.

[32] [1953] 1 W.L.R. 1285.

[33] [1955] 1 Q.B. 158.

[34] (1945) 62 T.L.R. 140.

[35] [1955] 1 Q.B. 158, 181.

"may be engaged in carrying out the services provided for by "the contract." For this statement, which was no doubt correct in 1954 if the Australian and United States cases were treated as authoritative, he cited the *Elder Dempster* case,[36] two Australian cases [37] which have since been overruled by the High Court of Australia, and two United States cases [38] which were overruled last week by the Supreme Court of the United States.

But Denning L.J. treated the position of the stevedores not as governed by any ratio decidendi which he discerned in the speeches in the House of Lords in the *Elder Dempster* case, but as an example of the general principle laid down in his own judgment in the *Snipes Hall* case.[39] He said [40]: "The reason "why the stevedores and others are protected is because although "they were not parties to the contract, nevertheless they participated in the performance of it, and the exception clause was "made for their benefit whilst they were so performing it. The "clause was not made expressly for their benefit, it is true, but "nevertheless it was by necessary implication, which is just as "good: and they have sufficient interest to entitle them to "enforce it. Their interest lies in this: They participated in it "in so far as it affected them and can take those benefits of it "which appertain to their interest therein."

The last sentence, at first sight, makes the general principle first laid down in the *Snipes Hall* case [41] much more precise, and that laid down in *White* v. *John Warrick & Co. Ltd.*[42] more restricted, for it defines, as neither of those cases sought to do, outside the more conventional categories of covenants running with the land, contracts entered into by agents for undisclosed principals, and contracts entered into by trustees for third parties, what constitutes a sufficient interest to entitle a third person to enforce provisions of a contract to which he is not a party. But on analysis I doubt whether it carries the matter any further than the *Snipes Hall* case [43] and *White* v. *John Warrick & Co. Ltd.*,[44] since ex hypothesi the exemption clause relates only to the performance of the contract; no one not "participating" in its performance would be doing anything which fell within the terms of the exemption clause, and no other interest in the third party is indicated save that the exemption clause was made for his benefit. It seems to me to do no more than to re-assert, but not to explain or to qualify, the very broad proposition laid down by the same Lord Justice in *White* v. *John Warrick & Co. Ltd.*[44]

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[36] [1924] A.C. 522.

[37] *Gilbert Stokes & Kerr Pty.* v. *Dalgety & Co.* (1948) 81 Ll.L.Rep. 337; *Waters Trading Co.* v. *Dalgety & Co.* [1951] 2 Lloyd's Rep. 385.

[38] *Collins & Co.* v. *Panama Railway Co.*, 1952 A.M.C. 2054; *Ford* v. *Jarka*, 1954 A.M.C. 1095.

[39] [1949] 2 K.B. 500.

[40] [1955] 1 Q.B. 158, 182, 183.

[41] [1949] 2 K.B. 500.

[42] [1953] 1 W.L.R. 1285.

[43] [1949] 2 K.B. 500.

[44] [1953] 1 W.L.R. 1285.

Denning L.J.'s observations in all three cases relied upon by Mr. Roskill were obiter. They seem to me, with great respect, to be in direct conflict with *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[45] and *Cosgrove* v. *Horsfall*,[46] both of which are binding upon me, and I do not think that I would be entitled to follow them, even if I were satisfied (as I am not) that the exemption clause in the bill of lading in the present case was expressly, or by necessary implication, made for the defendants' benefit.

I ought, finally, to refer briefly to a recent decision of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[47] The facts of that case were far removed from the present case, and the actual decision is readily explicable on the implied contract theory. Morris L.J. so treated it, I think, in *Adler* v. *Dickson*.[48] It may be that this does not represent Devlin J.'s actual ratio decidendi, for he was obviously influenced by the earlier Australian and United States cases, which had not been then overruled. It does appear from his references to the *Snipes Hall* case [49] and *White* v. *John Warrick & Co. Ltd.*[50] that he treated the *Pyrene* case [51] as falling within the wide principle stated in the dicta of Denning L.J. which I have cited. I have already, however, given my reasons for thinking that there is no such wide principle recognised in English law.

I myself think that the present case is governed by the simple, fundamental, though no doubt old-fashioned, principles laid down by Lord Haldane and approved by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*,[52] and that the defendants cannot limit their liability to the plaintiffs in tort by relying upon a contract between the plaintiffs and a third party to which they were not parties, and for which they gave no consideration to the plaintiffs. If in so deciding I am differing from the views expressed obiter by such distinguished lawyers as Scrutton and Denning L.JJ., I am fortified by the knowledge

[44] [1953] 1 W.L.R. 1285.
[45] [1915] A.C. 847.
[46] 62 T.L.R. 140.
[47] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.
[48] [1955] 1 Q.B. 158, 201.
[49] [1949] 2 K.B. 500.
[50] [1953] 1 W.L.R. 1285.
[51] [1954] 2 Q.B. 402.
[52] [1915] A.C. 847.

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that a similar conclusion has been reached by the High Court of Australia and the Supreme Court of the United States for reasons much better and, in the latter case, more succinctly expressed than my own.

There will be judgment for the plaintiffs.

Judgment for the plaintiffs for £593 12s. 2d. plus interest at 4 per cent.

Solicitors: *Ince & Co.; Hill, Dickinson & Co.*

J. D. P.

C. A.

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April 8, 9, 10; *May* 6.

Morris, Sellers and Willmer L.JJ.

COCKERILL *v.* WILLIAM CORY & SON LTD.

[1954 C. No. 3693.]

Dock—Regulations—Removal of safety gear—Construction and applicability of regulation 45*—Uncovered hatch—Docks Regulations,* 1934 (*S.R. & O.,* 1934, *No.* 279), *regs.* 37, 45.

The plaintiff's husband, a boatswain, fell to his death through an open hatchway of a vessel while she was loading a cargo of coal at a berth. Although the coamings of the hatch were about 5 feet in height there existed hatch covers which had been removed for the loading. The plaintiff claimed damages from the defendant shipowners alleging breach of regulation 45 of the Docks Regulations, 1934, in that the defendants had failed to replace the covers over the hatchway when the necessity for their removal had ended:—

Held, (1) the words "required by these regulations to be "vided" in regulation 45 of the Docks Regulations, 1934,[1] are

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[1] Docks Regulations, 1934, reg. 45: "No person shall, unless duly "authorised or in the case of necessity, remove or interfere with any "fencing, gangway, gear, ladder, "hatch covering, life-saving means "or appliances, lights, marks, "stages or other things whatsoever "required by these regulations to be "provided. If removed, such things "shall be restored at the end of the "period during which their removal "was necessary, by the persons last "engaged in the work that necessitated such removal."

Reg. 37: "(*a*) If any hatch of a "hold accessible to any person employed and exceeding five feet in "depth, measured from the level of "the deck in which the hatch is "situated, to the bottom of the hold, "is not in use for the passage of "goods, coal or other material, or for "trimming, and the coamings are less "than two feet six inches in height, "such hatch shall either be fenced to "a height of three feet or be securely "covered. Provided that this requirement shall not apply (i) to vessels "not exceeding 200 tons net regisrelated to and govern the items of equipment mentioned in the early part of the sentence, while the words "other things whatsoever" refer to other things required by the regulations in addition to the items required by the regulations that are previously mentioned specifically.

(2) That, as "hatch covering" in regulation 45 referred only to such a covering as was required to be provided by the regulations, and as by virtue of the height of the coamings no coverings were required by regulation 37 for the hatch through which the deceased fell, there could be no breach of regulation 45 in failing to replace the hatch coverings.

Dicta, obiter, of Lord du Parcq in *Grant* v. *Sun Shipping Co. Ltd.* [1948] A.C. 549, 561; [1948] 2 All E.R. 238 not followed.

Decision of McNair J. affirmed, but on different grounds.

APPEAL from McNair J.

On November 28, 1953, the defendants' self-trimming collier *Corfield*, a vessel of some 4,000 tons with four holds, two forward and two aft, was lying in a berth at the Commissioners Staithes, South Shields, loading a cargo of coal. The hatch coamings were approximately 5 feet high from the deck level. For the purpose of the loading three of the holds had been uncovered but No. 1 hold, the foremost one, had only been partly opened up, it not being intended to load coal into it that day. In these circumstances, George Robert Cockerill, a boatswain, fell to his death through the uncovered part of the hatchway. No one on the ship saw him fall, but it was inferred that he had climbed up on to the forward section of the hatch covers of No. 1 hold for the purpose of preparing an insurance wire for use when the ship had later that day to move out to mooring buoys for the weekend, and while so doing had fallen into the hold.

The plaintiff, widow and administratrix of the deceased, claimed damages from the defendant shipowners, alleging negligence and breach of regulation 45 of the Docks Regulations, 1934.

McNair J. found for the defendants. He rejected both the allegations of common law negligence and of breach of statutory duty. He found it quite impossible to assign any clear meaning to regulation 45. The plaintiff now appealed, pleading only breach of regulation 45.

"tered tonnage which have only one "hatchway, (ii) to any vessel during "meal times or other short interruptions of work during the period of "employment. (*b*) Hatch coverings "shall not be used in the construction "of deck or cargo stages, or for any "other purpose which may expose "them to damage. (*c*) Hatch coverings shall be replaced on the hatches "in the positions indicated by the "markings made thereon in pursuance "of regulation 14."

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The case is reported only on the question of the construction of regulation 45.

F. W. Beney Q.C. and *J. L. Elson Rees* for the plaintiff. The claim was brought for damages for breach of common law duty and breach of regulation 45 of the Docks Regulations, 1934. McNair J. found that there had been no common law negligence and no breach of statutory duty. The appeal relates only to the proper construction of the Docks Regulations and particularly of regulation 45. The judge took the view that the construction of regulation 45 found by Lord du Parcq in *Grant* v. *Sun Shipping Co. Ltd.*[2] was right, but on consideration of the results he concluded that regulation 45 was unintelligible and he ignored it. It is submitted that the second sentence of regulation 45 makes it plain that when of necessity the cover of a hatchway is removed, the owners of the ship must replace it when the process which causes the necessity ends. The deceased man was not under any duty to replace the cover without an order from an officer and no order was given.

[SELLERS L.J. I should have thought that the persons liable to replace the hatch covers were the people last engaged in loading the coal, and not the person who removed them.]

The breach was in not replacing the covers when the loading finished that day and the ship was about to be moved to the buoys, and it was the duty of the shipowners to comply with Part V of the regulations. They were engaged in the process. There is no inconsistency between regulation 37 and regulation 45. The latter quite clearly was broken by the shipowners. The judge regarded regulation 45 as unintelligible, but it is the primary duty of the court to apply it if possible.

[SELLERS L.J. It is frequently acted upon at Liverpool Assizes.]

[*Montague Berryman Q.C.* The defendants do not suggest that regulation 45 is unintelligible.]

Beney Q.C. Regulation 37 only covers hatchways, the coamings of which are less than 2½ feet in height, and regulation 45 is intended to sweep up matters not otherwise covered by the regulations. These hatch covers were taken off for a specific purpose, and they should have been replaced as soon as it was known that no coal was to be loaded in No. 1 hold that day.

[SELLERS L.J. The shipowners may have intended to take the opportunity of cleaning out No. 1 hold. You must treat this question widely. The object of the Docks Regulations was to protect dock labourers, not the crew. It is quite another question when the ship is on its own.]

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[2] [1948] A.C. 549, 561.

The deceased was engaged in "the process" at the time of his fall and he was entitled to the protection of the regulations. He was a man to whom these security regulations were designed to apply. If the words "required by these regulations" covered the words "hatch covers" there would be a conflict between regulations 37 and 45 because, under regulation 37, the covers may be taken off at various times; while under regulation 45 they may only be removed when it is necessary.

[WILLMER L.J. Do you say that the covers must be replaced each night when the work has stopped and removed afresh each morning?]

If that is not done it may be a breach of the regulation, but it may not always be done. The judge adopted Lord du Parcq's view, and he should have decided in the plaintiff's favour. [*Manchester Ship Canal Co.* v. *Director of Public Prosecutions*[3]; *Stuart* v. *Nixon*[4]; and *Howlett* v. *Shaw, Savill and Albion Co. Ltd.*[5] were also referred to.]

Montague Berryman Q.C. and *W. G. Wingate* for the defendants. On the evidence the real cause of the accident was the negligent act of the deceased; the failure to replace the hatch covers was not in any sense the cause. The judge found that there was no negligence by the defendants. It was submitted to the judge and is now submitted that most, if not all of the difficulty in construing regulation 45 disappears if it be read as dealing only with things which are required by the earlier regulations to be provided. It is also submitted that Lord du Parcq was in error in his obiter. The use, after the list of things required by the regulations to be provided, of the words "other things" shows clearly that it is adding additional things which are required for the purpose of securing safety. Regulation 37 is the only one which requires hatch covers to be used, and that is only if the coamings are less than 2½ feet in height, and then, alternatively, one may fence to 3 feet. In fact, at no stage was anything on this ship removed which was required by any regulation to be provided. The view of Lord du Parcq was wrong. Regulation 45 has nothing to do with this case, for no covers were required to be provided, the ship's coamings being more than

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[3] [1930] 1 K.B. 547; 46 T.L.R. 163.

[4] [1901] A.C. 79.

[5] (1936) 19 Ll.L.Rep. 176.

2½ feet high. Even if regulation 45 would have applied to this ship, it is contended that at the material time the ship had left the quay and the Docks Regulations no longer applied. [*Grant* v. *Sun Shipping Co. Ltd.*[6] and *Kininmonth* v. *France, Fenwick & Co. Ltd.*[7] were referred to.]

Beney Q.C., in reply, referred to *Mace* v. *Green and Silley Weir Ltd.*[8]

Cur. adv. vult.

May 6. Morris L.J. stated the facts and continued: The breach of statutory duty alleged at the hearing and on the appeal relates to regulation 45 of the Docks Regulations, 1934 (Statutory Rules and Orders), No. 279. [His Lordship read the regulation and continued:] That regulation appears in Part V. The regulations provide that it is the duty of all persons whether owners, occupiers or persons employed, to comply with Part V of the regulations.

On a consideration of regulation 45 the question arises whether the words "required by these regulations to be provided" govern all that had gone before, or whether they govern only the words "other things whatsoever." It is argued on behalf of the plaintiff that the latter is the correct construction. On that basis it is said that in the present case hatch coverings were removed, and it is said that in breach of the requirement in the second sentence of the regulation the hatch covers were not restored. It is said, therefore, that the defendants were in breach of the regulation.

[His Lordship read regulation 37 in Part IV of the regulations and continued:] It is clear that the depth from the level of the deck in which No. 1 hatch was situated to the bottom of the hold was more than 5 feet. Where there is such a hold and when the hatch is not in use for the passage of goods, coal or other material or for trimming, and where the coamings are less than 2 feet 6 inches in height, the hatch must either be fenced to a height of 3 feet, or be separately covered. That requirement is subject to the proviso in the regulation. But on the steamship *Corfield* the coamings of No. 1 hatch were about 5 feet in height. It is clear, therefore, that there was no requirement under regulation 37 which made it necessary to have hatch coverings over the hatch. Nor is any other regulation to be found which made it obligatory to have hatch coverings. If, therefore, when considering regulation 45 the proper construction is that the words "required by

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[6] [1948] A.C. 549.

[7] (1949) 65 T.L.R. 285.

[8] [1959] 2 Q.B. 14; [1959] 2 W.L.R. 504.

"these regulations to be provided" extend to and include the words "hatch covering," then on this ship there were no hatch coverings which were required by the regulations to be provided. If that were so, then no breach of regulation 45 would be shown.

This question of construction was referred to in the House of Lords in *Grant* v. *Sun Shipping Co. Ltd.*[1] In his speech in that case Lord du Parcq said as follows[2]: "My Lords, I think that "there is no doubt that these regulations imposed on the second "defenders the duty of replacing the hatch covering and of "leaving in place the light which was necessary for the illumination of that part of the ship in which the pursuer was working. "The question was raised in argument whether the words "'required by these regulations to be provided' in regulation 45 "were to be read as qualifying only the words 'other things what-"'soever' or as qualifying all the preceding substantives. Little "perhaps turns on this, since there was plainly a breach of regu-"lation 37 on the part of the second defenders, but I have no "doubt that the former construction is correct. No other seems "to me to be possible with due regard to the context. One of "the preceding words is the general word 'gear' and it cannot "have been the intention of the Secretary of State to prohibit "the removal only of such gear as was required by the regulations "to be provided."

Lord Porter had begun his speech by saying that he had had the opportunity of reading the opinion to be delivered by Lord du Parcq, and agreed with him in thinking that the appeal should be allowed. Lord Uthwatt said that he had had the advantage of reading in advance the opinion of Lord du Parcq, and that he entirely agreed with his reasoning and his conclusions. In that case common law negligence was established both against shipowners and ship repairers. As Lord du Parcq was of the opinion that there was a breach of regulation 37, he stated, accordingly, that little turned on the question of the construction of regulation 45. Counsel agreed that the opinion of Lord du Parcq on the question of construction was merely expressed obiter.

McNair J. proceeded on an acceptance of the view expressed by Lord du Parcq. It was furthermore a view that appealed to him. In his judgment he said as follows: "Neither counsel "submitted to me, nor do I think it right, that that passage in "Lord du Parcq's judgment was anything other than an obiter "expression of opinion and was not essential to the argument in

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[1] [1948] A.C. 549; [1948] 3 All E.R. 238.

[2] [1948] A.C. 549, 561.

"support of the view which Lord du Parcq was favouring. At "the same time it is a view expressed by a master in this "particular field of the Factories Act and the Docks Regulations, "and I would be very loath not to follow it unless I was convinced by argument that the view which Lord du Parcq "expressed must have been expressed per incuriam. Having "considered the regulation as a whole, it seems to me that the "view of construction which Lord du Parcq found to be quite "clear is one which I should follow, and, accordingly, that I "should take the view that hatch coverings in regulation 45 "means hatch coverings of any hatch whether the coamings are "less or more than 2 feet 6 inches in height."

Proceeding upon that basis, the judge then examined in detail the wording of regulation 45, and said that he found it quite impossible to assign any clear meaning to it, or to find in it any obligation which, on the facts of the case, would require that the hatch covers on No. 1 hatch should be replaced before the vessel shifted from her loading berth to the mooring buoys. It seems to me that in this case it does become essential to form a conclusion as to the construction of regulation 45. In considering the matter, although we are not bound by the view expressed by Lord du Parcq, it could only be after giving that view the most careful and respectful consideration that anyone would venture to differ from it. On the facts of this case it would, however, seem to be a strange result that if hatch coverings were not required by the regulations, yet because they existed there was a statutory requirement to restore them if they were removed. If they need never have been there at all, it would be surprising if, after their removal, a failure to restore them would involve committing an offence. If the regulation does apply, then on the facts of this case, so far as they are established, it is by no means clear upon whom the duty of restoring rested. The removal was necessary in preparation for the work of loading. The restoration has to be by "the persons last engaged in the work that necessitated such "removal." That would appear to denote in this case the persons engaged in the loading. The evidence does not clearly establish who they were. It was, however, contended that there was a duty on the owners to ensure that the restoration would take place, and that this duty was imposed upon the owners irrespective of the question as to the identity of the persons required to do the actual work of restoration.

The question arises, therefore, as to the construction of the first sentence of regulation 45. The view that I have formed is that the words "required by these regulations to be provided" govern the things mentioned in the early part of the sentence. The words "other things whatsoever" refer, in my view, to other things required by the regulations in addition to the things required by the regulations that are previously mentioned. An examination of the regulations shows that the words used in the first sentence of regulation 45 describe certain of the things which by the regulations had to be provided. Thus "fencing" is referred to in regulations 1, 26, 28 and 37. "Gangway" is referred to in regulation 9. The word "gear" may cover very many things such as those denoted in regulations 13, 19, 27, 28 and 29. The word "ladder" may refer to regulations 9, 11 and 28. As to "hatch coverings," in addition to the requirement in regulation 37 reference may be made to regulations 14, 15, 16 and 38. "Life-saving means or appliances" are referred to in regulation 2. "Lights" can have reference to regulations 3 and 12. "Marks" can have reference to regulations 14 and 29. "Stages" can have reference to regulations 36 and 40.

In the light of a consideration of the regulations as a whole I am reinforced in the view that regulation 45 has reference to things which the regulations require to be provided. Lord du Parcq was of the opinion that it could not have been the intention of the Secretary of State to prohibit the removal only of such "gear" as was required by the regulations to be provided. But the word "gear" is a somewhat comprehensive one, and if there were in fact some wholly unnecessary "gear" it would be surprising if a failure to replace after removal should be an offence. So, also, there might be many examples of lights on a ship other than those "required to be provided." It would again, in my view, be strange if there was an obligation to restore them after removal.

It was submitted by Mr. Beney that if the words "required "by these regulations to be provided" covered the words "hatch "coverings," there would be a conflict between regulations 37 and 45. He submitted that under regulation 37 hatch covers, when properly removed, need not be replaced during meal times or other short intervals of work during the period of employment, whereas under regulation 45 hatch covers, if removed, must be restored at the end of the period during which their removal was necessary. I am not impressed by this consideration, for it seems to me that the interval of meal times or other short interruptions of work would be within "the period" during which their removal was necessary.

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Morris L.J.

After endeavouring to approach the question of construction with every caution, I have reached the conclusion that in regard to hatch coverings regulation 45 refers to such hatch coverings as are required by the regulations to be provided. In the present case, because of the height of the hatch coamings, there was no requirement to provide hatch coverings on No. 1 hatch. It follows, therefore, that there was no breach of regulation 45 and that the claim fails on this ground.

If I had been of the contrary opinion, and had thought that regulation 45 applied to hatch coverings whether required by the regulations or not, I would not have shared the judge's difficulties in applying the regulation, and I would have considered that effect could and should be given to it.

The view that I have formed makes it unnecessary to deal fully with certain other matters touched upon during the arguments. Mr. Berryman did not contend that the deceased was not one who could claim the benefit of the regulations at the relevant time, but he submitted that the process of loading had ceased when the ship left the berth, and that the regulations no longer applied. I do not find it necessary to deal fully with this submission, but I am not prepared to accept it.

For the reasons that I have given I consider that the claim fails, and I would, therefore, dismiss the appeal.

Sellers L.J. I also would dismiss this appeal from the judgment of McNair J., but would decide against the claim on somewhat different grounds. [His Lordship reviewed the circumstances of the deceased's fall and continued:]

The steamship *Corfield* was a self-trimming collier of some 4,000 tons. She had in the forepart of the vessel a hold 30 feet by 30 feet with deck space on each side limited to 4 feet 6 inches between the coamings and the bulwarks. No doubt because of this construction the coamings were the unusual height of 5 feet.

Regulation 37 had no application to this hold, as it applies only where coamings are less than 2 feet 6 inches in height. This is of considerable significance in this case as coamings of 5 feet high might well justify the shipowner or the ship's officers regarding an open hatchway in such circumstances as constituting no danger. Any activity on the hatch coverings, complete or partial, would appear to have to be deliberate, and no accidental use of that area would ever be contemplated. In respect of such a well guarded hatch it would appear improbable that regulations would be necessary. But it was argued that regulation 45 applied and had been infringed. On the face of it I would regard regulation 45 as dealing with very different circumstances, namely, where safety precautions had been taken and circumstances required their removal. With due deference to the construction put by Lord du Parcq on this regulation in the course of his speech in *Grant* v. *Sun Shipping Co. Ltd.*,[3] I would, if free so to do, hold the contrary view.

The regulation enjoins, as I would read it, that no person, unless duly authorised or in the case of necessity, shall remove or interfere with any of the things required by the regulations to be provided (most of which are enumerated) "or other things "whatsoever" required by the regulations if not expressly enumerated. That is, the words "required by these regulations "to be provided" qualify all the preceding requirements set out. This view is, I think, supported by regulation 46, which particularises "the fencing required by regulation 1," and then stipulates special restrictions with regard to those requirements.

It is conceded that Lord du Parcq's observations were not essential to the decision, but in addition to the authority of an opinion of Lord du Parcq further weight is given to his view, it is said, because the other noble Lords in terms expressed general agreement with the judgment without qualification. It is to be observed, however, that what the second defendants had removed in that case were hatch covers and lighting equipment which were in fact "required by these regulations to be provided," and therefore there was no reason in that case to give the words of regulation 45 the extended meaning which Lord du Parcq thought the correct meaning. The other noble Lords may, therefore, have considered that regulation 45 could properly be applied without accepting Lord du Parcq's construction.

I do not, therefore, feel that we are bound to follow the view there expressed, or that the reasoning of Lord du Parcq is sufficiently impelling to require us so to do. On the view I would take the hatch covers on that hold were not required to be provided here by the regulations, and therefore regulation 45 cannot be applied in this case. Even if it could, I doubt if the regulation required the shipowners to replace them.

The work that necessitated their removal—which removal might have been done by the ship as the vessel was approaching the Tyne or her berth at the staithes, as was done in respect of holds 2 and 3—was the loading of coal. The shipowners, I understand, were not the persons engaged or to be engaged in the loading, and therefore were not the persons required by regulation 45 to restore the covers at the end of the period during which their removal was necessary.

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[3] [1948] A.C. 561.

I think this serves to show that the attempt to apply the regulation to this case is misconceived, although I would not support the view that, when properly invoked, the regulation is unintelligible. It has, I think, not infrequently been relied on, and its infringement proved, without any real difficulty.

No question has arisen in the case whether the deceased man through whom the plaintiff claims could claim the benefit of the regulations in any event as he was a member of the ship's crew and not a stevedore. It was submitted that the regulations would not apply in any case if the vessel had left her loading berth to proceed to moorings in the river. These are difficult points which in general both remain for consideration on some occasion, but if the construction I would put on regulation 45 is correct they do not arise, and in any case the evidence does not appear adequately to have been directed to them.

Willmer L.J. (read by Morris L.J.). This appeal relates solely to the contention put forward on behalf of the plaintiff that the defendants were in breach of their statutory duty in that they failed to comply with regulation 45 of the Docks Regulations, 1934.

[His Lordship read reg. 45 and continued:] It is not in dispute that about 10 a.m. on the day of the accident the two after sections of the hatch covers over No. 1 hold were removed, leaving only the forward section in place; nor that by 12.15 p.m., when the vessel started to move from her berth—by which time no cargo had been loaded into No. 1 hold—no attempt had been made to replace the hatch covers which had been removed. The fair inference, accepted by both sides, is that the deceased, prior to falling through the open part of the hatch, had climbed up on to the platform formed by the forward section of hatch covers, and that he did so for the purpose of preparing the insurance wire, which would have been required for use in mooring the vessel when she reached the buoys to which she was proceeding.

The contention for the plaintiff is that, by failing to restore the hatch covers which had been removed from No. 1 hatch, as soon as it was known that no cargo was to be loaded that day in that hold, the defendants or their servants were in breach of the obligation imposed upon them by the second sentence of regulation 45. That regulation, it is contended, by its terms applied to any hatch covering, so that the mere failure to restore the hatch covers which had been removed was sufficient to constitute a breach. On this view the words "required by these "regulations to be provided" are to be construed as qualifying only the words "other things whatsoever," and not any of the other items of equipment, such as hatch coverings, previously enumerated in the regulations.

On the other side, the defendants contend that the words "required by these regulations to be provided" must be read as qualifying not only the words "other things whatsoever," but also all the particular items of equipment previously enumerated. If so, it is said, there was no requirement in any of the regulations whereby this hatch was required to be covered.

[His Lordship read reg. 37 (*a*) and continued:] Since the coamings of No. 1 hatch in this vessel were 5 feet in height, there was no requirement under regulation 37 that it should be either fenced or covered. Accordingly, the defendants contend, regulation 45 had no application to the hatch covers of No. 1 hatch, since these did not amount to a "hatch covering required "by these regulations to be provided."

The judge preferred the plaintiff's construction of regulation 45, and held that the phrase "hatch covering" in that regulation meant the covering of any hatch, whether the coamings of that hatch were less or more than 2 feet 6 inches in height; that is, in his view it was not limited to a hatch covering "required by these regulations to be provided." It followed, therefore, that in the judge's view regulation 45 applied directly to the hatch covers of No. 1 hold in this case. He proceeded to point out, however, that the application of regulation 45, so construed, would lead to anomalous results, more particularly having regard to the obligations imposed by regulation 37 (*a*). In view of these anomalies, and in view of certain illogicalities which he detected in the provisions of regulation 45 itself, he held that the language of the regulation did not convey, either to a lawyer or to a seafaring man, what its plain meaning is, and he refused to find that in the circumstances of this case there had been any breach of the regulation. He concluded by saying: "I find it quite impossible, after, I hope, a serious and "proper effort, to assign any clear meaning to regulation 45, to "find in it any obligation which on the facts of this case would "require that the hatch covers on this No. 1 hatch should be

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"replaced before the vessel shifted from her loading berth to "the mooring buoys."

Given the premises from which he started, I should for myself find it quite impossible to follow the judge to the conclusion at which he arrived. If regulation 45 applied to the hatch covering of No. 1 hatch, its meaning would in my judgment be plain enough. It would clearly require that the hatch covers removed should be restored at the end of the period during which their removal was necessary, and that moment would come, I apprehend, as soon as it was learnt that no cargo was to be loaded in that hold before the vessel shifted. If the regulation applies, the duty of the court is to apply it, and that duty is not to be shirked merely because, in the view of the court, the application of the regulation may lead to anomalous or illogical results. On the authority of the cases cited by the judge—to which may be added the recent decision of Lord Parker C.J. in *Mace* v. *Green & Silley Weir Ltd. and British India Steam Navigation Co. Ltd.*[4] —I think there can be no doubt that at the material time the process of loading was still going on within the meaning of the regulations. If, therefore, regulation 45 was applicable at all, it was applicable at the time of the accident, and on that basis I am satisfied that the facts proved would constitute a breach of it. I do not think, therefore, that the judge's decision can be supported upon the grounds which he stated.

The real question, to my mind, is whether regulation 45 ever applied at all to the facts of this case. That depends upon whether it is right to hold, as the judge held, that only the words "other things whatsoever" are qualified by the succeeding words "required by these regulations to be provided," so that the previously enumerated items of equipment—fencing, gangway, gear, and so forth—are left completely unqualified. In reaching his conclusion upon this point, the judge based himself largely upon the dictum of Lord du Parcq in *Grant* v. *Sun Shipping Co. Ltd.*[5] This has already been quoted, but I think it useful to set out once more the actual words used by Lord du Parcq, which were as follows: "The question was raised in argument whether the "words 'required by these regulations to be provided' in regula-"tion 45 were to be read as qualifying only the words 'other "'things whatsoever' or as qualifying all the preceding sub-"stantives. Little perhaps turns on this, since there was plainly "a breach of regulation 37 on the part of the second defenders,

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[4] [1959] 2 Q.B. 14; [1959] 2 W.L.R. 504.

[5] [1948] A.C. 561.

"but I have no doubt that the former construction is correct. "No other seems to me to be possible with due regard to the "context. One of the preceding words is the general word "'gear,' and it cannot have been the intention of the Secretary "of State to prohibit the removal only of such gear as was "required by the regulations to be provided."

The other Lords who concurred in Lord du Parcq's conclusion did not deal with this matter specifically, but at least it can be said that they did not express any dissent from the view expressed by Lord du Parcq. Clearly, however, Lord du Parcq's expression of view was not necessary to the decision of that case, for in that case the hatch covering in question was indubitably one to which the provisions of regulation 37 (*a*) applied. This court is, therefore, free to examine the question de novo, though it will naturally pay the greatest possible respect to an expression of view coming from so high an authority. Speaking for myself, it is only after the most anxious consideration that I have come to the conclusion that the construction put upon the regulation by Lord du Parcq was erroneous, and I do so only because, as it seems to me, that construction produces a nonsensical result, which cannot have been intended.

In order to appreciate this, I think it is desirable to look at the scheme of the regulations as a whole. They were made in pursuance of section 79 of the Factory and Workshop Act, 1901—but are now deemed to have been made in pursuance of section 60 of the Act of 1937—and are expressed to have been made "in "respect of the processes of loading, unloading, moving and "handling goods in, on, or at any dock wharf, or quay, and the "processes of loading, unloading and coaling any ship in any "dock, harbour, or canal." Part I, which is to be complied with by the person having the control of a dock, provides for the installation of various safety devices in and about the dock, for example, fencing of the dock, provision of life-saving appliances and first-aid boxes. Part II, which is to be complied with by the owner, master or officer in charge of a ship, provides for such things as safe means of access to a ship in dock, and to its holds, for proper lighting, for the maintenance and marking of hatch coverings, and for the provision of suitable gear for lifting them. Part III, which is to be complied with by the owner of any machinery or plant used in the processes (which of course includes a shipowner so far as concerns any plant or machinery on board the ship), provides for the testing and examination of lifting gear, the marking of safe working loads, the fencing of working parts and of crane platforms, and such like matters. Part IV, which is to be complied with primarily by those carrying on the processes, that is, stevedores, but which in certain circumstances, in relation to regulation 37, must be complied with by the owner, master or officer in charge of the ship, provides in substance for safety precautions to be observed during the carrying on of the processes. Part V, of which regulation 45 is the first provision, is of universal application and must be complied with by all persons, whether owners, occupiers or persons employed. Regulations 45 and 46 deal with removal of, or interference with, certain specified appliances. Regulation 47 prescribes that the means of access provided shall be used; and regulation 48 prohibits all persons from going onto the hatch beams for the purpose of adjusting the gear for lifting them.

Bearing in mind the scheme of the regulations, one would expect that prima facie regulation 45, when it refers to removal of, or interference with, the various appliances or items of equipment, would refer to those previously prescribed in the preceding regulations. But for the contrary view expressed by Lord du Parcq I should, without hesitation, have said that that was the plain and ordinary meaning of the words used. I should have thought that the phrase "other things" in the first sentence was to be construed as ejusdem generis with the specifically enumerated items previously referred to, the genus being those things which are "required by these regulations to be provided." That this view is correct is, I should have thought, reinforced by the use of the words "such things" in the second sentence.

It is necessary, however, to examine the contrary view expressed by so high an authority as Lord du Parcq. It seems to me that, unless the words "required by these regulations to be "provided" are held to govern *all* the items of equipment previously enumerated, the regulation would have to be construed as of universal application, that is, as applying to *any* fencing, *any* gangway, *any* gear, *any* ladder, and so forth, without geographical limitation, and without regard to whether they had anything to do with carrying on the processes to which the regulations refer. Thus, to use the illustrations given in argument, the expression "ladder" would have to be construed as including any ladder, for example, a painter's ladder, that happened to be in use on the dock side. The expression "lights" would have to be construed as including any light, whether on shore or on board ship, regardless of whether it had any relation to the processes to which the regulations refer. A cabin light, for instance, would apparently be within the regulation—and, to push the matter to its logical conclusion, since this part of the regulations must be complied with by the owner, even the light in the owner's office in London would not escape. Such a result would, of course, be palpably absurd. But if the scope of the regulation is not to be limited by applying the words "required "by these regulations to be provided" to all the items previously enumerated, what other limitation, it may be asked, is to be imposed? Lord du Parcq singled out the word "gear," and expressed the view that it could not have been the intention of the Secretary of State to prohibit the removal only of such gear as was required by the regulations to be provided. I venture to ask "Why not?" Unless so limited, the word "gear" is wide enough to include any gear of whatsoever nature, and wheresoever situated, regardless of whether it has any relation to the processes to which the regulations are directed. Again, what construction is to be put on the words "marks" and "stages," unless they are held to refer to the marks required by regulation 14, and to the stages prescribed by regulations 36 and 40?

The fact is that all the items of equipment enumerated in regulation 45 are items which form the subject of one or more of the preceding regulations. There would be every reason of good sense for enacting in regulation 45 that those items, the provision of which had been required by the preceding regulations, should not be removed or interfered with except when duly authorised, or in case of necessity. Thus, the reference to ladders becomes intelligible if it refers to ladders required by the preceding regulations, for example, regulations 9, 11 and 28. Similarly, the prohibition against removing or interfering with lights is good sense if the lights referred to are those prescribed by regulations 3 and 12. But unless regulation 45 is construed as limited in this way, it clearly goes far beyond anything required for the protection of persons engaged in the processes with which the regulations are intended to deal, and leads inexorably to utterly absurd results such as I have already mentioned, and such as were referred to by the judge in the course of his judgment.

Let me now examine the construction of regulation 45 contended for by the plaintiff in relation to the matter of hatch covering. By way of preface I may perhaps be permitted to remark that the primary purpose of hatch covers is to protect the cargo and prevent water from entering the ship. They are not designed in the first instance for the protection of personnel, whose safety is ordinarily cared for by the provision of proper hatch coamings. With regard to the particular hatch in question here, it is clear that there was no regulation which required the provision of any hatch covering at all while the vessel was in port. Nor was there any reason, from the point of view of safety of personnel, why there should have been any such regulation, since the particular hatch was in fact permanently "fenced" by coamings 5 feet high. What, then, would be the object of a regulation prohibiting the removal of something that need never have been there at all? It cannot be said that there could be any reasonably foreseeable danger in leaving the covers off such a hatch, for if there were, the judge would clearly have been wrong to find that there was no negligence at common law in leaving the covers off this hatch—yet there has been no appeal with regard to this part of his judgment. If regulation 45 is limited in its application to hatch coverings required by the regulations to be provided, there is clearly good reason for it: for where the regulations have provided that, for reasons of safety, certain hatches should be either fenced or covered, it is obviously sensible to provide that such covering or fencing shall not be removed or interfered with. But on the construction contended for by the plaintiff, regulation 45 goes far beyond this, and prohibits the removal of, or interference with, any hatch covering, apparently without regard to whether any question of safety is involved. In other words, the argument involves that a regulation has been made which goes far beyond anything required for the safety of persons engaged on the processes. For myself, unless constrained by authority, I would decline to hold that a regulation made by the Secretary of State is to be construed in such a way. Since I am not constrained by any binding authority to hold otherwise, I prefer to construe regulation 45 in accordance with what I conceive to be the ordinary and natural meaning of the words used, and to hold that the words "required by these regulations "to be provided" are related to and qualify all the items of equipment previously enumerated.

If that view be right, it is conclusive of this case. The only hatch covering required by the regulations to be provided is that specified in regulation 37, which admittedly would have no application to the hatch in question in this case. It follows, therefore, that there could be no breach of regulation 45 in failing to replace the hatch covers on this hatch, seeing that such hatch covers were not required by the regulations to be provided. Accordingly, I arrive at the same conclusion as that reached by the judge, although for different reasons, namely, that no breach of statutory duty has been proved against the defendants.

Although it is unpleasant to have to say it of a man who is dead, I think there can be no doubt but that the sole cause of this unfortunate accident was the failure of the deceased man to exercise proper care for his own safety. There was abundant evidence from experienced seafaring witnesses on both sides that what the deceased man must be presumed to have been doing was a dangerous and a wrong thing to do. Although the judge in his judgment made no express finding against the deceased man, it is implicit in his reasoning that his view must have been that the deceased man was in fault. In view of the absence of any statutory duty on the part of the defendants, the point is of only academic interest.

For these reasons, I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *E. B. V. Christian & Co.; Botterell & Roche.*

A. W. G.

CLACK *v.* ARTHUR'S ENGINEERING LTD.

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1959
Mar. 11, 12; *May* 11.

Hodson, Romer and Willmer L.JJ.

County Court—Practice—Non-suit—Facts decided against plaintiff—Order of non-suit without consulting parties—Judicial discretion—County Court Rules, 1936 (*S.R. & O.*, 1936, *No.* 626), *Ord.* 23, *r.* 3.

The plaintiff entered the service of the defendants as works manager, but his employment was terminated by the defendants at the end of the first week and he was paid a week's salary and an additional week's pay in lieu of notice. He claimed that although paid weekly he was engaged for a month's trial period in the first instance. He therefore sued the defendants for the balance of a month's salary, amounting to £65 18s. It was not pleaded that the notice was inadequate. The defendants denied that there had been any engagement for a month's trial period. The county court judge, having heard evidence on both sides, found that the plaintiff had not proved his case, but invited him to amend his particulars of claim; this his counsel elected not to do and the judge then non-suited the plaintiff under Order 23, r. 3, of the County Court Rules, 1936,[1] and awarded the costs to the defendants. The defendants appealed:—

Held, (1) that once the evidence had been completed and the judge had found the facts, he had an unfettered discretion to enter a non-suit regardless of the absence of consent of the plaintiff.

(2) That Order 23, r. 3, applied, not only when the evidence fell short of proving the pleaded case, but also where the plaintiff's evidence, but for the fact that it was disbelieved, would have substantiated his claim.

National Cash Register v. *Stanley* [1921] 3 K.B. 292 applied.

Westgate v. *Crowe* [1908] 1 K.B. 24 distinguished.

But (3), that the judge had failed to exercise his discretion judicially in that (a) he arrived at his decision to non-suit the plaintiff without hearing counsel on either side; and (b) the plaintiff had elected not to accept the invitation to amend his particulars of claim and should not be granted the concession of a non-suit when he had already had his chance to frame his case in an alternative way, for the overriding consideration was that, in the public interest, there should be an end to litigation.

Per curiam. Consideration might well be given to the desirability of abolishing the power to non-suit in the county court, as it has been abolished in the High Court.

APPEAL from Judge Reid, sitting at Kingston-upon-Thames County Court.

The plaintiff, Christopher Sidney Clack, having entered the services of the defendants, Arthur's Engineering Ltd., as works manager, his contract of employment was terminated at the end of the first week and he was paid an additional week's salary in lieu of notice. He asserted that although paid weekly he was engaged for a month's trial period, and he claimed for the balance of a month's salary, amounting to £65 18s. The defendants denied that there was any engagement for a month's trial period and contended that as the plaintiff was paid weekly he was only entitled to a week's salary in lieu of notice.

The county court judge, having found that the plaintiff had failed to prove his claim, invited him, by his counsel, to amend his particulars of claim, but counsel expressed himself as satisfied with the claim as it stood. The judge thereupon non-suited the plaintiff and awarded the costs to the defendants. The defendants appealed, contending (1) that the power to non-suit a plaintiff could not be exercised without the consent of the plaintiff and that consent had not been given or asked; (2) that Order 23, r. 3, of the County Court Rules, 1936, had no application to the present case, where the plaintiff's evidence, if it had been accepted, would have fully proved his case, and (3) that if Order 23, r. 3, applied the judge had not exercised his discretion judicially and should have given judgment to the defendants.

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[1] County Court Rules, 1936, Ord. 23, r. 3: "(1) Where the plaintiff "appears but does not prove his "claim to the satisfaction of the "court, it may either non-suit him, "or give judgment for the defendant. "(2) Where—(*a*) after a plaintiff has "been non-suited; or (*b*) after an "action has been struck out; a subsequent action for the same or substantially the same cause of action "is brought before payment of any "costs awarded to the defendant "when the plaintiff was non-suited "or the proceedings were struck out, "the court may stay the subsequent "action until such costs have been "paid."

M. J. Anwyl-Davies for the defendants. Instead of non-suiting the plaintiff the judge should have entered judgment for the defendants, in whose favour he found on the merits. He misdirected himself in entering a non-suit without the consent or the wish of the plaintiff. The power of non-suit now only operates in the county courts and can only be exercised at the wish or with the consent of the plaintiff. That consent was not given here. It was done without any discussion and solely by the judge of his own motion.

Order 23, r. 3, of the County Court Rules, which deals with non-suit, does not alter the common law procedure: see Parke B. in *Stancliffe* v. *Clarke*.[2] The plaintiff was never asked to assent to the non-suit. The judge had been asked by plaintiff's counsel to give judgment on the issue raised by the particulars of claim and the judge non-suited him. The refusal of plaintiff's counsel to amend his pleadings at the invitation of the judge was, in effect, asking the judge to decide the issue. The defendants have disclosed their hand below and it would not be right to give the plaintiff another bite at the cherry.

Order 23, r. 3, does not apply to this case. It only applies where the plaintiff's evidence does not support the pleaded case. Here the evidence, if it had been accepted, would have fully supported the pleaded case. If Order 23, r. 3, does apply, it is then submitted that the judge failed to exercise his discretion judicially in ordering a non-suit without giving counsel on either side an opportunity to object, and in giving the plaintiff another chance to sue the defendants. [*Robinson* v. *Lawrence*[3]; *Outhwaite* v. *Hudson*[4]; *Kershaw* v. *Chantler*[5]; *Poyser* v. *Minors*[6]; *Fletcher* v. *London and North Western Railway Co.*[7]; *Fox* v. *Star*

[2] (1852) 7 Ex. 439.

[3] (1852) 7 Ex. 124.

[4] (1852) 7 Ex. 380.

[5] (1872) 26 L.T. 474.

[6] (1881) 7 Q.B.D. 329.

[7] [1892] 1 Q.B. 122.

Newspaper[8]; *Westgate* v. *Crowe*[9]; *Cross* v. *Rix*[10]; *Ryder* v. *Wombwell*[11] were cited.]

John B. Deby for the plaintiff. In the county court the power to non-suit survives and is specifically preserved by Order 23, r. 3, of the County Court Rules. The judge is given a discretion. The option is that of the judge and not that of the plaintiff. The plaintiff no longer has a right to be non-suited, so that he may come again on the same or a similar case. If the mere fact that no consent had been obtained from the plaintiff was enough to determine the question, why were not the cases decided on that issue? In *Fletcher* v. *London and North Western Railway Co.*[12] the objection of Lord Esher M.R. to the non-suiting of the plaintiff was that the judge had done it too soon. The basis of the decision in *Outhwaite* v. *Hudson*[13] was that the plaintiff was entitled to a non-suit if he wished up to the last moment. Now he has no right of election. It is clearly not a matter upon which the court need consult the plaintiff at all. In both *Cross* v. *Rix*[14] and *Fletcher's* case[15] the objection was that the plaintiff had never had an opportunity of proving his case. In *Davis* v. *Hardy*[16] the plaintiff was non-suited against his will.

No objection was taken at the trial by the plaintiff to the non-suit. If he had amended his particulars of claim it might have increased the award but he might have lost more on costs.

Order 23, r. 3, does not say "Where the plaintiff fails to produce evidence to support his claim" but "Where the plaintiff does not prove his claim." The court is entitled to take into account the defendants' evidence. It must have been apparent to the judge that non-suit would be to the benefit of the plaintiff, and being of opinion that the plaintiff had not made out his claim he decided, in his discretion, that it was a case for non-suit. If the judge goes no further than saying that "the plaintiff has not established his case to my satisfaction," it is a case for non-suit: see *Westgate* v. *Crowe*.[17] He has not found that the defendants were not liable. He thought that there was another way of pleading with reasonable probability of success. Had there been a clearer indication of what the judge was thinking of the case it would have been possible to amend the particulars of claim. It was not an indication that he did not accept the plaintiff's evidence. His judgment shows that he was not satisfied that the defendants were not liable, and the non-suit was a proper exercise of his discretion. [*National Cash Register* v. *Stanley* [18] was also cited.]

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[8] [1900] A.C. 19.

[9] [1908] 1 K.B. 24.

[10] (1912) 29 T.L.R. 85.

[11] (1868) L.R. 4 Ex. 32.

[12] [1892] 1 Q.B. 122.

[13] (1852) 7 Ex. 380.

[14] (1912) 29 T.L.R. 85.

[15] [1892] 1 Q.B. 122.

[16] (1827) 6 B. & C. 225.

[17] [1908] 1 Q.B. 24.

Davies in reply. The power today is not different from the powers declared clearly in the Act of 1846. The county court came into existence as a creation of that Act. In *Stancliffe* v. *Clarke* [19] the point was sought to be made that the Act had in some way been altered. It is submitted that the rule has not been altered. *Fox* v. *Star Newspaper* [20] does not assist the plaintiff's contention. It would be highly artificial to say that there was any assent to be implied. The reasoning in that case applied to the High Court and not to the county court. The plaintiff having invited the judge to pronounce judgment and then, having heard sufficient to realise that judgment was going against him, could not then ask the judge for a non-suit. He had divested himself of his right to apply for a non-suit.

May 11. WILLMER L.J. read the following judgment of the court. In this case the defendants appeal from a judgment of His Honour Judge Reid, given at Kingston-upon-Thames County Court on October 28, 1958, whereby he non-suited the plaintiff and awarded costs to the defendants. It is contended that judgment ought to have been entered for the defendants with costs.

The plaintiff claimed damages from the defendants for wrongfully terminating his contract of employment as works manager. His case was that, though paid weekly, he was engaged for a month's trial period in the first instance. The defendants, however, terminated his employment at the end of the first week, paying him an additional week's salary in lieu of notice. The plaintiff's claim was, therefore, for the balance of a month's salary, amounting to £65 18s. The defendants denied that there was any engagement for a month's trial period, and contended that as the plaintiff was paid weekly they were entitled to dismiss him with a week's notice, or with a week's salary in lieu of notice.

The judge, having heard evidence from the plaintiff and from Mr. Arthur for the defendants, preferred the evidence of Mr. Arthur, and found that the plaintiff had failed to prove his claim to have been engaged for a month in the first instance. He held that on the pleadings as they stood no other question arose, and in particular that no question arose as to whether, apart from the alleged engagement for a month, the notice received by the plaintiff was a proper notice. After the conclusion of the evidence, and before giving judgment, the judge had invited counsel for the plaintiff to consider whether he was satisfied with the particulars of claim as they stood—a clear invitation, as it seems to us, to amend the particulars of claim so as to put forward an alternative claim that the plaintiff was dismissed without reasonable notice. Counsel for the plaintiff, however, expressed himself as satisfied with the particulars of claim as they stood, so that the judge was left with only the one issue to determine, namely, whether the plaintiff had made out his case that he was engaged for one month.

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[18] [1921] 3 K.B. 292.

[19] 7 Ex. 439.

[20] [1900] A.C. 19.

In these circumstances the judge, having found that the plaintiff had failed to establish the case set up in the particulars of claim, concluded his judgment as follows: "The plaintiff "therefore cannot succeed. But I am not altogether satisfied "that proper justice would have been done if judgment were "given for the defendants, and this seems to me to be one of "the rare cases in which the plaintiff should be non-suited."

Since the introduction of the 1883 Rules of the Supreme Court, the High Court retains no power to enter a non-suit: see *Fox* v. *Star Newspaper.*[1] But in the county court the power survives, and is specifically preserved by Order 23, r. 3, of the County Court Rules, 1936. [His Lordship read the rule and continued:] It follows that, in the present case, on the judgment of the judge, the plaintiff would be free, upon payment of the defendants' costs, to institute a fresh action in which he would be able to make a second claim for damages for wrongful dismissal, which, in the light of what the judge said, would no doubt be based on the absence of reasonable notice. This, the defendants say, would be a hardship to them, and on this appeal they contend that the judge was wrong to non-suit the plaintiff. and that he ought to have entered judgment for the defendants.

Three submissions have been advanced on behalf of the defendants in support of the appeal. First, it has been contended that the power to non-suit a plaintiff cannot be exercised without the consent of the plaintiff. Here the plaintiff never consented to be non-suited, and was never invited to consent. Secondly, it has been urged that the rule has no application to a case such as the present, where the plaintiff's evidence, if it had been accepted, would have fully proved his case. This is not a case, it is pointed out, in which the plaintiff's evidence fell short of proving his pleaded case; on the contrary, the evidence would have proved the claim but for the fact that it was disbelieved. The defendants' third submission is that, assuming the rule to be applicable to the circumstances of this case, the judge failed to exercise his discretion judicially, in that he chose to non-suit the plaintiff, without being invited to do so, after the plaintiff by his counsel had specifically declined an invitation to amend the particulars of claim.

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[1] [1900] A.C. 19; 16 T.L.R. 97.

In order to appreciate the significance of the defendants' first submission it is necessary to refer briefly to the history of non-suit in the High Court and county court respectively. Before the Supreme Court of Judicature Act, 1873, there is no doubt that in the common law courts, which were the predecessors of the Queen's Bench Division of the High Court, the power to enter a non-suit existed at common law. In the case of the county courts, however, their jurisdiction was wholly statutory, and the power of the court in relation to non-suit was defined by section 79 of the County Courts Act, 1846, the material part of which provided: ". . . if he shall appear, but shall not make "proof of his demand to the satisfaction of the court, it shall "be lawful for the judge to non-suit the plaintiff, or to give "judgment for the defendant."

Though the wording is different, the substance of that provision is in our judgment precisely the same as that of the present Order 23, r. 3 (1), of the County Court Rules, 1936. In 1852, in *Stancliffe* v. *Clarke*,[2] it was laid down by Parke B., in relation to section 79 of the Act of 1846, "that the term 'non-"'suit' is there used in the same sense as in ordinary law "proceedings," by which we understand him to have meant that non-suit had the same meaning in relation to proceedings in the county court as it had at common law. The Judicature Act of 1873 contained a provision whereby, in the High Court, a judgment of non-suit became a bar to subsequent proceedings, in the same way as judgment for the defendant would be; and shortly afterwards a similar provision was introduced into the County Court Rules. This situation persisted, so far as the High Court was concerned, until 1883, when the Rules of the Supreme Court came into force. These, as previously mentioned, contained no provision whatever for non-suit, and since that date non-suit in its strict sense has found no place in the procedure of the High Court. We use the phrase "in its strict sense" because there have been a number of cases in which the expression "non-suit" has been loosely used in the High Court, where all that has been meant has been that the defendant had no case to answer: see, for example, *Fletcher* v. *London and North Western Railway Co.*,[3] where we think it must be clear that the term is used in this loose sense.

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[2] (1852) 7 Ex. 439.

The history of non-suit in the county court has been somewhat different, for there, since 1888, the power to non-suit has been specifically preserved. The effect of section 88 of the County Courts Act, 1888, was substantially to re-enact section 79 of the Act of 1846, and, as has already been pointed out, the present rule in the County Court Rules, 1936, is for all practical purposes the same. For 70 years, therefore, there has been a divergence between the High Court and county court practice, so far as non-suit is concerned. This circumstance makes it impossible, in our judgment, to invoke section 100 of the County Courts Act, 1934, so as to interpret the county court rule relating to non-suit by reference to the present practice of the High Court. In relation to this we venture to differ from the view expressed by the editors of the County Court Practice in the first paragraph of the notes to Order 23, r. 3. Having regard to the similarity between the present rule and the provision of section 79 of the Act of 1846, we entertain no doubt that the powers of the county court today in relation to non-suit must be related to the practice of the old courts of common law as it existed prior to 1873.

In support of his proposition that, by the practice of the old common law courts, the power to non-suit a plaintiff could not be exercised without the plaintiff's consent, counsel for the defendants relied in the first instance on *Stancliffe* v. *Clarke*, where Parke B. said[4]: "It is optional with the plaintiff whether he "will submit to be non-suited; and in the event of his refusing, "if there is no case to warrant a verdict for him, it is the duty "of the judge to direct the jury to find for the defendant." Reliance was also placed on *Robinson* v. *Lawrence*,[5] *Outhwaite* v. *Hudson*,[6] and *Kershaw* v. *Chantler*.[7] In *Robinson* v. *Lawrence*,[8] where the appeal was by the defendant, Parke B. said: "The question was, whether or not the plaintiff in an "action for money had and received, in which there was a plea "of set-off, after the judge had taken time to consider, and

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[3] [1892] 1 Q.B. 122; 8 T.L.R. 77.
[4] 7 Ex. 439, 446.
[5] 7 Ex. 123, 124.
[6] 7 Ex. 380, 381.
[7] (1872) 26 L.T. 474.
[8] 7 Ex. 123, 124.

"before the judge had delivered his verdict, could be non-suited: "and whether the judge had power to direct a non-suit, according "to the Acts of Parliament which regulate the county courts. "At common law, whenever the plaintiff ought to appear in "court, he was at liberty to withdraw. In the present case, "when the judge was about to deliver his opinion, and indeed "by the permission of the judge, the plaintiff withdrew. We "have looked through the County Court Acts, but do not find "any clause contained in them that prohibits the plaintiff from "exercising this common law right. We therefore think that in "this case the plaintiff was at liberty to be non-suited, and that "the judge was right in permitting him to be non-suited."

In *Outhwaite* v. *Hudson*[9] the claim was for breach of warranty of a horse. After the judge had directed the jury, and while the jury were deliberating, the plaintiff stated that he elected to be non-suited. The defendant objected, and the judge held that the plaintiff's election to be non-suited was too late. On appeal by the plaintiff it was held that the county court judge was wrong in refusing to allow the plaintiff to be non-suited. Parke B. said[10]: "The plaintiff's power of demanding to be non-suited "continued to the last moment—until the jury had given their "verdict; or, where the case is tried by a judge without the "intervention of a jury, until the judge has pronounced his "judgment."

Kershaw v. *Chantler*[11] was a case where the county court judge, after the completion of the plaintiff's case and during the hearing of the defendant's witnesses, discharged the jury, and, notwithstanding the repeated protests of the plaintiff and his attorney, and without the plaintiff's consent, directed a non-suit to be entered. It was held, upon a rule calling upon the judge to proceed with the trial of the cause, that the judge had acted judicially, and that therefore the court had no power to afford the plaintiff any remedy upon this rule. But the members of the court left no room for doubt that in their view the county court judge had been in error in thus non-suiting the plaintiff without his consent. Cockburn C.J. is reported as saying[12]: "I regret "much that we have no power upon this rule to direct a new "trial; for with no propriety can a judge non-suit a plaintiff "without his consent."

If the matter stopped there, it would seem that the discretion which section 79 of the County Courts Act, 1846, appears by its

[9] 7 Ex. 380, 381.

[10] Ibid. 381.

[11] 26 L.T. 474.

[12] Ibid. 475.

terms to have conferred on the court "to non-suit the plaintiff, "or to give judgment for the defendant" was wholly illusory, and that there was in practice no discretion, the court being bound to abide by the election of the plaintiff. If that were true of the Act of 1846, we should, it seems, be bound to hold that the present Order 23, r. 3, of the County Court Rules, 1936, must be construed in the same way. But by way of contrast to the cases already cited reference should next be made to *Davis* v. *Hardy*,[13] to which our attention was called by counsel for the plaintiff. In that case, which was decided in 1827, the plaintiff claimed damages for malicious prosecution. At the conclusion of the plaintiff's case the judge indicated that in his view there was sufficient evidence of want of probable cause. The defendant accordingly called a witness, and on the conclusion of his evidence the judge intimated that on the whole of the evidence there was a probable cause for preferring the indictment. Counsel for the plaintiff insisted that it ought to be left to the jury to decide whether they believed the evidence of the defendant's witness. The judge, however, refused to leave any question to the jury, and non-suited the plaintiff. On appeal by the plaintiff it was held by Abbott C.J., with whom Bayley J. concurred, that the non-suit was proper, and that the rule for setting it aside must be discharged.

Here, then, was a case in which clearly the plaintiff was non-suited against his will, and at first sight it is a little difficult to reconcile this decision with the view expressed some 25 years later by Parke B. in *Stancliffe* v. *Clarke*[14] that "it is "optional with the plaintiff whether he will submit to be non-"suited."

Reference may also usefully be made to Tidd's Practice (1828), 9th ed., vol. 2, p. 867, where the following statement appears: "If it be clear that, in point of law, the action will "not lie, the judge at nisi prius will non-suit the plaintiff, "although the objection appear on the record, and might be "taken advantage of by motion in arrest of judgment, or on a "writ of error. But where the case turns on a question of fact, "it ought to be submitted to the jury, unless the plaintiff's "counsel expressly assent to his being non-suited." We confess that we find the statement in the first sentence of this extract difficult to reconcile with the view expressed by Parke B. in *Stancliffe* v. *Clarke*,[14] that "if there is no case to warrant a "verdict for [the plaintiff], it is the duty of the judge to direct

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[13] (1827) 6 B. & C. 225.

[14] 7 Ex. 439, 446.

"the jury to find for the defendant." Equally, the second sentence is at variance with what was done in *Davis* v. *Hardy*,[15] and there is in fact a footnote calling attention to the discrepancy.

It is, however, relevant to remark that all the authorities to which we have so far referred related to cases where the question of non-suit arose before verdict. Before attempting to account for the apparent discrepancy between the decision in *Davis* v. *Hardy*[15] and those in the other cases referred to, it is useful to examine the practice in relation to non-suit after verdict. No such cases were cited to us in argument, but an examination of the reports of cases during the first half of the nineteenth century reveals the fact that it was a frequent occurrence for a plaintiff to be non-suited after verdict quite regardless of his own wishes. By way of illustration we may perhaps refer to two cases which happen to have been cited to this court in another connection since the conclusion of the argument in the present appeal. It appears from *Doe* d. *Armstrong* v. *Wilkinson*[16] that after the verdict of the jury the defendant was entitled to move for a non-suit, and the court had a discretion to grant or refuse it. Similarly, *Doe* d. *Duke of Bedford* v. *Kightley*[17] seems to have been a case of non-suit after verdict against the plaintiff's wish, and upon the plaintiff obtaining a rule to set aside the non-suit, which was opposed by the defendant, the rule was made absolute. Other cases are to be found in the reports where a verdict was given for the plaintiff, but with leave to the defendant to move to set that verdict aside and to enter a non-suit.

From an examination of all these cases it seems possible to draw the following conclusions: (1) At any time up to verdict, if the plaintiff elected to be non-suited he was entitled to it as of right, and the court had no discretion to refuse: see *Robinson* v. *Lawrence*[18]; *Outhwaite* v. *Hudson*.[19]

(2) If before verdict the plaintiff refused to be non-suited, the position is not so clear. If the statement in Tidd's Practice is correct the plaintiff could apparently be non-suited if his action was not sustainable in point of law. And it would appear from *Davis* v. *Hardy*,[20] notwithstanding the contrary view expressed in Tidd's Practice, that, where all the evidence on both sides had been taken, the court had a discretion to enter a non-suit, even against the expressed wish of the plaintiff that the evidence should go to the jury. The apparently contrary views expressed

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[15] 6 B. & C. 225.

[16] (1840) 12 Ad. & El. 743.

[17] (1796) 7 Term R. 63.

[18] 7 Ex. 124.

[19] 7 Ex. 380.

[20] 6 B. & C. 225.

in *Stancliffe* v. *Clarke* [21] and *Kershaw* v. *Chantler* [22] may perhaps be explained on other grounds. In *Stancliffe* v. *Clarke* there was a submission of no case, and it was in this context that Parke B. said that a non-suit against the will of the plaintiff was not allowable, but that if there was no case it was the duty of the judge to direct a verdict for the defendant. In *Kershaw* v. *Chantler* it was during the hearing of the defendants' witnesses that the judge discharged the jury and, without the plaintiff's consent, directed a non-suit to be entered. It may be, therefore, that the apparent discrepancy between those decisions and that in *Davis* v. *Hardy* [23] is to be explained on the basis that in the former cases the relevant question was whether a non-suit without the plaintiff's consent was admissible at so early a stage in the case.

(3) Once the evidence had been completed and the verdict of the jury taken—or, where there was no jury, once the judge had found the facts—it seems clear that the court had an unfettered discretion, if the verdict was against the plaintiff, either to enter a non-suit or to give judgment for the defendant.

If this analysis of the procedure before the old courts of common law is correct, it seems to us to be destructive of the first submission put forward on behalf of the defendants. The present case clearly belongs to the third class mentioned above, in that the judge decided to non-suit the plaintiff only after all the evidence had been given and he himself had given his judgment on the facts. In such a situation it seems clear that, following the old practice of the courts of common law, the judge had an unfettered discretion to enter a non-suit regardless of the absence of consent on the part of the plaintiff. The defendants, therefore have no cause for complaint on this appeal merely on the ground that the plaintiff was non-suited without his consent.

We pass, therefore, to the second submission put forward on behalf of the defendants—namely, that Order 23, r. 3, of the County Court Rules, 1936, has no application to a case such as the present, where the plaintiff's evidence, but for the fact that it was disbelieved, would have fully substantiated the claim put forward on his behalf. The contention is that the rule, on its true construction, applies only to a case where the evidence called for the plaintiff falls short of substantiating the pleaded case. Reliance is placed on the wording of the rule, which refers to a plaintiff who " does not prove his claim to the satisfaction

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[21] 7 Ex. 439.

[22] 26 L.T. 474.

[23] 6 B. & C. 225.

"of the court"—words which, it is contended, are appropriate to a case where the evidence falls short of proving the pleaded case, but are quite inappropriate to a case where the plaintiff's evidence is rejected and that of the defendant is preferred. In support of this we were referred to the decision in *Westgate* v. *Crowe*,[24] where the evidence adduced for the plaintiff in an action for personal injuries showed clearly that the liability was not that of the defendant, but of another party not before the court, and it was held that a non-suit was not the appropriate remedy, but that the defendant was entitled to judgment.

In our judgment this argument, though attractive, is fallacious. This is not a case like *Westgate* v. *Crowe*,[24] where the evidence showed that in no circumstances could the defendant be liable. Here, as we understand the view of the judge, the plaintiff might yet be able to succeed against the defendants if his claim were framed in a different way. But even if it were framed in a different way, it would still be a claim against the defendants for damages for wrongful dismissal—that is to say, this is not a case in which any other possible claim would be an entirely different cause of action. We do not think that the argument based on the wording of the rule is sound, for the words used are, in our judgment, wide enough to cover any case in which the evidence is held not to prove the claim, whether because it is of itself insufficient, or because it is rejected in favour of the defendants' evidence. In this connection it may perhaps be remarked, by way of illustration, that the form of decree in a matrimonial cause, whereby it is pronounced "that "the petitioner has sufficiently proved the contents of the said "petition," is the same whether the cause be undefended or defended. We do not see how *Davis* v. *Hardy*[25] could have been decided as it was, unless it was regarded as competent for the court to non-suit a plaintiff where his evidence was rejected on the strength of that called for the defendant. Moreover, we find it difficult to reconcile the argument for the defendants with the decision of the Divisional Court in *National Cash Register* v. *Stanley*,[26] to which we were referred by counsel for the plaintiff. In that case the plaintiffs brought a default summons against the defendant in the county court for an alleged debt incurred owing to the defendant's refusal to accept delivery of a cash register under a hire-purchase agreement. The deputy county court judge held that on the evidence no debt was proved, but that the plaintiffs' remedy, if they had one, was by way of an action for damages. He is reported as having said[27]: "As the plain-"tiffs have chosen to proceed by default summons they cannot "obtain damages in this action, but there is no reason why they "should not do so in a fresh action properly constituted. I "think the proper course is to enter a non-suit." On appeal to the Divisional Court it was held by Lush J. and Sankey J. that the judge was right and that his judgment should be affirmed.

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[24] [1908] 1 K.B. 24; 24 T.L.R. 14.

[25] 6 B. & C. 225.

[26] [1921] 3 K.B. 292; 37 T.L.R. 776.

In these circumstances we find ourselves unable to accept the second submission put forward on behalf of the defendants, or to say that Order 23, r. 3, has no application to a situation such as arose in the present case. In our judgment this case is within the rule, and it was a matter for the discretion of the county court judge whether he should non-suit the plaintiff or give judgment for the defendants.

It remains, therefore, to consider the defendants' third submission, namely, that, assuming the rule to apply, the judge failed to exercise his discretion judicially having regard to all the circumstances of the case. It is on this point that in our judgment the judge's order is open to attack. It is not unimportant to observe that the plaintiff here was not without legal advice. He had the advantage of counsel and solicitors not only in presenting the case in court, but also in preparing the particulars of claim. This is not a case of an unassisted litigant who, through ignorance, may perhaps plead his case the wrong way or fail to produce all the necessary evidence in support. We apprehend that it was largely with a view to assisting such persons that the power to enter a non-suit was preserved in the county court after its abolition in the High Court.

In our view the judge's exercise of discretion in this case was open to criticism in two ways. First, he appears to have arrived at his decision to non-suit the plaintiff without hearing counsel on either side. The possibility of a non-suit was not discussed in argument and, as we were informed, the order which the judge made took counsel on both sides completely by surprise. We do not think it is a judicial exercise of discretion to make an order of this kind without giving the parties affected an opportunity of being heard.

An even more serious criticism, in our view, is that the judge non-suited the plaintiff—thereby giving him the opportunity of bringing fresh proceedings against the defendants—after he had already specifically drawn attention to the state of the plaintiff's

[27] [1921] 3 K.B. 292, 293, 294.

pleaded case, and had invited counsel for the plaintiff to consider whether any amendment was desired. The plaintiff has, therefore, already had his chance of putting forward his claim against the defendants in the alternative way, and—not in ignorance, or hastily, but deliberately through his counsel—has elected not to take advantage of the opportunity already afforded to him. To give him a second chance now, thereby enabling him to harass the defendants by instituting fresh proceedings, would, in our judgment, be a grave injustice to the defendants in the circumstances of this case. It seems to us that much the same considerations apply to the question that arises in this case as apply when an application is made to this court for leave to amend a party's pleading, when that party has already been offered, and has refused, an opportunity of doing so in the court below. Such an application is not readily granted; and for similar reasons we do not think that a plaintiff should readily be granted the concession of a non-suit, when he has already had his chance to frame his case in an alternative way. In either case, as it seems to us, the overriding consideration is that in the public interest there should be an end to litigation.

For these reasons, although the defendants have failed to satisfy us that under the rule it was not competent for the judge to non-suit the plaintiff, they are, in our judgment, entitled to succeed on this appeal on the ground that in the circumstances of this case he failed to exercise his discretion judicially by doing so. The appeal must therefore be allowed.

We cannot leave this case, however, without venturing to offer the suggestion that consideration might well be given to the desirability of abolishing the power to non-suit in the county court, as it has been abolished in the High Court. Non-suit was a remedy suitable enough in an age when the plaintiff won or lost his case according to the way in which it was pleaded, and when no right of amendment existed such as exists today. Bearing in mind the right of discontinuance which is conferred by Order 18, and the abundant facilities for amendment provided under Order 15 of the County Court Rules, we find it difficult to appreciate what object is served by preserving in the county court today the old common law remedy of non-suit, which we venture to think few practitioners of today fully understand.

Appeal allowed with costs.

Solicitors: *Sharpe, Pritchard & Co. for Horne, Engall & Freeman, Egham, Surrey; W. H. Thompson.* A. W. G.

C. A.

1959
April 22,
23, 24;
May 14.

Hodson,
Romer and
Pearce L.JJ.

GREEN *v.* RUSSELL.
McCARTHY (THIRD PARTY).

[1956 G. No. 97.]

Fatal Accidents Acts—Damages—Insurance—Payment to employer under personal accident group insurance policy—Employer "absolute "owner" of policy—Employer's payment to deceased employee's dependant—Whether payment to be taken into account in assessing damages—Whether deceased employee had legal or equitable interest in policy moneys—Fatal Accidents (Damages) Act, 1908 (8 *Edw.* 7, *c.* 7), *s.* 1.

Insurance—Interest of third party in policy—Life or accident insurance —Accident resulting in death to employee—Policy contracted by employer—Whether employee's estate has legal or equitable interest in policy moneys.

Contract—Parties—Enforcement by third party.

By section 1 of the Fatal Accidents (Damages) Act, 1908: "In "assessing damages in any action, . . . under the Fatal Accidents "Act, 1846, . . . there shall not be taken into account any sum paid "or payable on the death of the deceased under any contract of "assurance or insurance. . . ."

In 1951 an employer took out a personal accident group insurance policy which, after reciting "Whereas the insured is desirous of "securing payment of benefits as hereinafter set forth to any insured "person," provided that "if . . . any insured person shall sustain "bodily injury" resulting in death, the insurance company should pay a specified sum, and that "the company shall be entitled to "treat the insured as the absolute owner of this policy and shall "not be bound to recognise any equitable or other claim to or "interest in the policy and the receipt of the insured . . . alone shall "be an effectual discharge." The policy described the employer as the "insured" and named as the "insured persons" certain of his employees. Those employees knew of the existence of the policy but it formed no part of the terms of their employment, nor did the employer undertake any obligation to maintain or renew the policy.

In 1955 one of the employees named as an "insured person" died in a fire which occurred on the employer's premises. The employee's mother brought an action under the Fatal Accidents Acts in which liability was admitted and damages were agreed at £1,300. On the question whether a sum of £1,000 paid under the policy by the insurance company in respect of the death to the employee's solicitors and paid or about to be paid by them to the employee's mother was a benefit arising out of the death which should be taken into account and deducted from the agreed damages:—

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

Held, (1) that the deceased employee had no right at law to the policy moneys, since he was not a party to the contract of insurance and therefore could not sue on it.

Dunlop Pneumatic Tyre Co. Ltd. v. *Selfridge & Co. Ltd.* [1915] A.C. 847; 31 T.L.R. 399; and dictum of Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70, 79; (1933) 49 T.L.R. 90 applied.

Dicta of Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500, 513, sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179, and in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt* [1954] 1 Q.B. 250, 269; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475 not followed.

(2) That the mere intention to provide benefits was insufficient to create a trust, and, accordingly, the deceased employee did not have any equitable interest in the policy moneys.

In re Schebsman [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768 applied.

(3) (*Per* Hodson and Romer L.JJ.) that while (contrary to the view of the trial judge) it could not be accepted that the expression "paid or payable on the death of the deceased under any contract "of . . . insurance" in the Act of 1908, was descriptive of the sum received, with the result that once a sum falling within that description was paid it was irrevocably stamped as a section 1 payment, notwithstanding that under the contract it was neither paid nor payable to the deceased employee or his estate, yet the sum still fell within the provisions of the Act because the Act contemplated and extended to payments contractually made to or on behalf of or for the benefit of employees or dependants.

(*Per* Pearce L.J.) That the money was paid "under" the terms of the policy because (a) it was a payment envisaged by the policy, and (b) the expression "paid or payable on the death of "the deceased under any contract of . . . insurance" was descriptive of the sum itself and did not involve the corollary that the sum must be paid or payable to the deceased under the contract of insurance.

Bowskill v. *Dawson* (*No. 2*) [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649 considered.

(4) That, accordingly, the money did not fall to be deducted from the agreed damages.

Decision of Ashworth J. [1959] 1 Q.B. 28; [1958] 3 W.L.R. 371; [1958] 3 All E.R. 44 affirmed.

APPEAL from Ashworth J.[1]

The plaintiff, Florence Green, a widow, suing on her own behalf and as the administratrix of the estate of her son, Alfred Edward Green, claimed damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts. 1846 to 1908, in respect of the death of her son on June 6, 1955, in a fire which occurred in the premises where he was employed, against the defendant, Sarah Anne Russell, widow, the administratrix of the estate of his employer, Arthur Henry Russell, who also died in the fire.

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[1] [1959] 1 Q.B. 28; [1958] 3 W.L.R. 371; [1958] 3 All E.R. 44.

The defendant admitted liability in the action and took third party proceedings which were settled out of court. Damages were agreed at £1,300, subject to the issue, which was the only issue before the court, of whether £1,000 should be deducted from the agreed figure of damages. The sum of £1,000 represented a payment which had been made by the Yorkshire Insurance Co. Ltd. to the defendant, who then handed the money over to the plaintiff.

The money had become payable under the terms of a personal accident group policy issued by the insurance company in 1951 to Mr. Russell. The policy, after reciting that "whereas "the insured is desirous of securing payment of benefits as hereinafter set forth to any insured person in the event of his "sustaining accidental bodily injury as hereinafter provided . . . "and has paid or agreed to pay the premium as consideration for "such insurance . . ." provided that "if at any time during the "currency of this policy any insured person shall sustain bodily "injury . . . and such injury shall . . . section A—result in death "the company shall pay the sum insured stated in section A in "the schedule."

By condition 5 of the policy: "The company shall be entitled "to treat the insured as the absolute owner of this policy and "shall not be bound to recognise any equitable or other claim to "or interest in the policy and the receipt of the insured or the "insured's legal representative alone shall be an effectual discharge." By condition 8: "The due observance and fulfilment "of the terms conditions and endorsements of the policy in so far "as they relate to anything done or complied with by the insured "or any insured person . . . shall be conditions precedent to any "liability of the company to make any payment under this "policy."

The schedule to the policy set out as "insured Arthur H. "Russell," while under the heading "insured persons" there were listed the names of certain of the employees, among them that of the plaintiff's son, and the sum set out opposite his name in section A was £1,000. Although the existence of the policy was known to the employees named therein in such a manner as to create in their minds a reasonable expectation of benefit for themselves or their dependants in the event of their being injured or killed, that did not affect their attitude to their employment so as to cause them, in consideration of those possible benefits, to refrain from giving notice or asking for an increase in salary, nor did the employer undertake an obligation to maintain or renew the policy.

The issue whether the £1,000 should be deducted from the agreed damages depended on whether it was "paid or payable" on the death of the son "under any contract of assurance or "insurance" within the meaning of section 1 of the Fatal Accidents (Damages) Act, 1908.[2]

The trial judge held that the words "paid or payable . . . "under any contract of assurance or insurance" were descriptive of the sum in question and did not involve it being paid pursuant to the contract. Accordingly, the sum did not fall to be deducted from the agreed damages, and he gave judgment for the plaintiff for £1,300.

The defendant appealed.

M. Dunbar Van Oss for the defendant. The point that has arisen in the present case was envisaged in *Bowskill* v. *Dawson* (*No. 2*),[3] but it was left undecided. That case decided that where assurance moneys were paid to an employee's dependants by trustees under the terms of a trust set up by the employer, the moneys were paid under a contract of assurance within the Fatal Accidents (Damages) Act, 1908, and were, therefore, not deductible when making an award of damages under the Fatal Accidents Acts, 1846–1908. That decision cannot be challenged in this court, but the right to do so in a higher court is formally reserved. In the present case, there was no trust, but the money was paid voluntarily by the defendant to the plaintiff as a moral obligation or gesture. *Bowskill* v. *Dawson* (*No. 2*) [3] was quite different from the present case. The basis of the decision was that the claimants under the policy—the dependants—had rights in themselves under the policy and under the scheme, rights in equity, and that it would be an undue restriction of the Act of 1908 to say that in such a case the payment is not made under the contract of assurance. But the plaintiff here had no right to the money, and the payment of the money was entirely dependent on the volition of the defendant. The fact that the money paid over originated from the policy is an entirely irrelevant and fortuitous consideration. By condition 5 of the policy the insured was the absolute owner of the policy, and no one else had any rights in the policy.

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[2] Fatal Accidents (Damages) Act, 1908, s. 1: "In assessing damages "in any action, whether commenced "before or after the passing of this "Act, under the Fatal Accidents Act, "1846, as amended by any subse-"quent enactment, there shall not be "taken into account any sum paid or "payable on the death of the deceased "under any contract of assurance or "insurance, whether made before or "after the passing of this Act."

[3] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

At common law all gains consequent on death had to be taken into account in assessing damages. The Act of 1908 provided an exception to the general rule: see *Baker* v. *Dalgleish Steam Shipping Co.*[4] But a benefit was only consequent on the death of a person if it was reasonably probable that it would be received as the result of death. Where a sum of money was voluntarily given, spontaneously and unexpectedly, it was not taken into account, because it was not consequent on the death: see *Peacock* v. *Amusement Equipment Co. Ltd.*[5] A person who prays in aid an exception to the general rule must bring himself clearly within the exception. So here, the plaintiff must bring herself clearly within the Act, and the Act cannot be given other than its ordinary meaning for this purpose: see *Smith* v. *British European Airways*, *per* Hilbery J.,[6] and *O'Neill* v. *S. J. Smith & Co.* (*Bidford*) *Ltd.*, *per* Hallett J.[7]

In the phrase "there shall not be taken into account any sum "paid or payable on the death of the deceased under any contract "of assurance or insurance" the most vital word is "under." "Any" does not carry the matter any further. In its ordinary and plain meaning "payable under a contract" means payable as a result of an obligation created by the contract—a payment made pursuant to and because of the contract. When the money was paid to the defendant, the contract was then discharged and it is legally dead. If the recipient of the money voluntarily decides to transfer it, that is an act far too remote from the contract of insurance to be something done under it. Here it was transferred under a sense of moral obligation, not under the contract. The judge proceeded on the view that the moneys were labelled or identified as the insurance moneys and that the term "paid under a contract of insurance" was merely describing the source of the moneys. But the Act was not concerned with moneys derived from or attributable to insurance policies. It was dealing only with moneys paid out in discharge of a contract

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[4] [1922] 1 K.B. 361; 38 T.L.R. 245.

[5] [1954] 2 Q.B. 347; [1954] 3 W.L.R. 288; [1954] 2 All E.R. 689.

[6] [1951] 2 K.B. 893, 904; [1951] 2 T.L.R. 608; [1951] 2 All E.R. 737.

[7] [1957] 1 W.L.R. 1204, 1208; [1957] 3 All E.R. 255.

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of insurance. But where, as here, money is paid in discharge of a moral obligation, there is a novus actus interveniens—a new cause arising. It does violence to one's sense of language to say that an entirely voluntary act of payment has anything to do with insurance. An entirely voluntary act of the type here in question snaps the chain of causation. The construction put upon the section by the judge is an intolerable strain on its language and would reduce the section to absurdity. Suppose the plaintiff were to transfer the money to X, it could be said on the judge's view that the money was paid to X under the contract of insurance; or suppose she left it by will to Y and died, the same could be said of the receipt by Y. There would be no end to the matter.

Marven Everett Q.C. and *John Ritchie*, for the plaintiff, applied to put in a notice relying on the grounds that the deceased had a right either at common law or in equity to receive the money.

[HODSON L.J. We will grant you leave.]

In construing the Act of 1908 it must be borne in mind that it was a relieving statute designed to ensure that the victim of a wrong was not penalised in damages on account of his thrift. Two things are envisaged: first, that damages are payable to the dependants of the deceased, and, secondly, that they are paid on account of his death. The section dealt with the whole matter generally, and the words " any sum paid or payable . . . under " any contract of assurance or insurance " are plainly descriptive of the sum in question. Those words identify the money as the insurance money. The fact that the insured alone is the only person who can give an effectual discharge to the insurance company does not alter the money being treated and regarded as the plaintiff's insurance money. The defendant's contention involves writing into the section after " insurance or assurance " the words " which is effected by him." But there is nothing in the Act to say that the benefit of the Act is restricted to persons who have contracted with the insurance company. Had that been intended, it would have been easy to say so. That was not Parliament's intention; it was dealing with all kinds of policies and every kind of payment, and its intention was to exclude all of them in assessing damages. The section deals with the matter quite generally: see *Davies* v. *Powell Duffryn Collieries Ltd.*[8] The words of the section are apt to describe the source of the moneys being excluded.

Certain features of the policy lead to the inference that it

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[8] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.

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created a trust of the policy moneys. First, it provided for the payment of benefits. The beneficiaries named in the policy had a reasonable hope of benefiting from it. Secondly, condition 8 of the policy, whereby the due observance of the terms of the policy by the insured person is made a condition precedent to the insurer's liability, contemplates the assumption of responsibility for other persons by the insured person. Thirdly, the insured agreed to pay the premiums, and he was under an obligation to account to the beneficiaries if he received any moneys. He was under no obligation to renew the policy. There was here an implied trust; it is to be implied from the proposal, the policy and the continuance in his employment by the deceased. The only reasonable inference of fact is that the employer intended to constitute himself a trustee for the benefit of the persons named in the policy as the beneficiaries: see *Prudential Staff Union* v. *Hall*[9] and *Woods* v. *Woods*.[10] In the present case there is a contemplated event—accidental bodily injury to the deceased, and a trust was created. [Reference was also made to *Tomlinson* v. *Gill*.[11]]

The deceased had also a right at common law to the money. The principle is most clearly enunciated by Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*,[12] when he said of the argument that there was no privity of contract, "it has never been able entirely to supplant another "principle whose roots go much deeper. I mean the principle "that a man who makes a deliberate promise which is intended "to be binding, that is to say, under seal or for good considera- "tion, must keep his promise; and the court will hold him to it, "not only at the suit of the party who gave the consideration, "but also at the suit of one who was not a party to the contract, "provided that it was made for his benefit and that he has a "sufficient interest to entitle him to enforce it, subject always, "of course, to any defences that may be open on the merits." The deceased here falls plainly within the ambit of the above principle. The difficulty always is to define what is a sufficient interest, but the deceased certainly had a "sufficient interest" in the policy. Denning L.J. reaffirmed his views in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*.[13] But they were only giving effect to the old common law position: see *Dutton* v. *Poole.*[14] The position was misunderstood in *Tweddle* v. *Atkinson*[15]; and the view that a person had to be a party to a contract to be able to sue on it was assumed to be the law without any argument in *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[16] If there were any rule about privity of contract, it has been removed by section 56 of the Law of Property Act, 1925, which provides that a person can take the benefit of a covenant although not a party to it: see *Chelsea and Walham Green Building Society* v. *Armstrong.*[17] *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[18] also lends support to the contention of the plaintiff; in that case Devlin J. said[19]: "There is nothing novel "about the idea of a third party coming in to enforce a contract "either as an undisclosed principal or as a beneficiary. . . . It "is a principle which has to be constantly invoked where the "subject-matter of the contract is likely to be transferred during "the currency of the contract."

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[9] [1947] K.B. 685; 63 T.L.R. 392.

[10] (1836) 1 Myl. & Cr. 401.

[11] (1756) Amb. 330.

[12] [1949] 2 K.B. 500, 513; sub nom. *Smith* v. *River Douglas Catchment Board* (1949) 65 T.L.R. 628; [1949] 2 All E.R. 179.

[13] [1954] 1 Q.B. 250, 269; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.

Ritchie following. It is clear here that the policy is a benefit policy, and looking at the recital "whereas the insured is desirous "of securing payment of benefits . . ." the question immediately arises: payment to whom? The policy states: to any insured person. The promise to pay is silent about the payee; he is referred to in the schedule. Condition 5 of the policy, which provides that the insured shall be treated as the owner of the policy, is unusual in its wording. It was only inserted because no specific payee is stated in the policy itself, and as a matter of machinery the insurance company wanted to deal with only one person. But it is not thereby seeking to qualify or limit the persons eligible for benefit. The benefit is payable to the insured person—it is called the insured sum. The position is the same as if there were a little bag with the deceased's name on it. On a certain event occurring the stated sum becomes payable to the insured person. This is set out by the policy itself. It cannot now be said that the money has not been labelled. It is purely fortuitous that only five or six persons were involved in this particular policy. There might have been thousands. It would be an intolerable inconvenience for an insurance company to deal with a multitude of estates after an explosion in a large factory.

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[14] (1678) 1 Freem.K.B. 471; 1 Vent. 332.

[15] (1861) 1 B. & S. 393.

[16] [1915] A.C. 847; 31 T.L.R. 399.

[17] [1951] Ch. 853; [1951] 2 T.L.R. 312; [1951] 2 All E.R. 250.

[18] [1954] 2 Q.B. 402; [1954] 2 W.L.R. 1005; [1954] 2 All E.R. 158.

[19] [1954] 2 Q.B. 402, 422.

It therefore looks to a particular person for the discharge of its obligation, and it canalises it through the insured. But it cannot be said that, because it is the insured and not the insurance company who discharges the obligation, it is not one created by the policy. It cannot be said that the insured, by paying out the money to the deceased, has taken the label off the bag.

Van Oss in reply. A person who is not a party to a contract cannot sue on it. That principle has now been firmly established by the highest authority: see *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[20]; and *per* Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York.*[21] *Dutton* v. *Poole* [22] could not be supported today. Section 56 of the Law of Property Act, 1925, does not arise here, because there is no covenant; in any case the section is only dealing with land or property of a similar nature. Choses in action are dealt with in a separate part of the Act, commencing at section 130. It is inconceivable that Parliament intended to overrule a rule of common law by a sidewind in a section of an Act dealing with real property. There has been no suggestion in cases subsequent to 1925 that section 56 had any such effect: see *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [23] and *In re Schebsman.*[24]

To create a trust the words relied on must show a clear intention to create an obligation: see *In re Williams.*[25] In that case a testator gave his estate to his wife in "the fullest confidence "that she [would] carry out [his] wishes." It was held that there was no trust. Looking as benevolently as one wishes at this policy, it does not show any intention to create an obligation on the insured. He is simply paying premiums to secure benefits for certain persons. No word in the policy puts an obligation on him. He did not even agree to pay the money over to the beneficiaries. The insured if he wished could have kept the money. Undoubtedly he intended that it should be paid over, but there was no obligation on him to do so. An employee who received money from the employer, and then claimed for his injuries in an action for negligence, could recover his money twice over. The apparent unfairness or harshness of there being no obligation on the employer may not therefore be as unjust as it seems. The court must be satisfied that the words of the policy are clearly imperative in its terms so as to constitute a trust. There is no suggestion of an obligation in this policy as respects third parties. Condition 5, moreover, makes it clear that there can be no claims by outsiders. That was inserted to make it absolutely plain that the only obligation created by the policy was between the two parties to the contract. The beneficiaries named in the policy had no interest or rights in it.

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[20] [1915] A.C. 847; 31 T.L.R. 399.

[21] [1933] A.C. 70, 79; 49 T.L.R. 90.

[22] 1 B. & S. 393.

[23] [1933] A.C. 70.

[24] [1944] Ch. 83; 60 T.L.R. 128; [1943] 2 All E.R. 768.

[25] [1897] 2 Ch. 12.

On no sensible construction could it be said that the money was paid "under" the contract of assurance. It is impossible to ignore the intervention of an entirely new voluntary act that resulted in the payment of the money.

Cur. adv. vult.

HODSON L.J. I have had the advantage of reading the judgment which Romer L.J. is about to deliver. I agree entirely with that judgment and the reasons which he will give. I only wish to emphasise that those reasons are applicable to this particular case and I do not wish to be taken as going further than Romer L.J. in answering the question left open by this court in *Bowskill* v. *Dawson* (*No. 2*).[1]

ROMER L.J. This is an appeal from an order of Ashworth J., under which the plaintiff was awarded the sum of £1,300 against the defendant in an action brought under the Fatal Accidents Acts, 1846–1908. The plaintiff sued as the administratrix of her son, Alfred Edward Green, who was, at the time of his death, employed as an assistant architect by Arthur Henry Russell, and the defendant is Russell's legal personal representative.

The facts are not in dispute. Russell was an architect and had office premises at 11, Duke Street, Bermondsey. He and Green and other employees of Russell worked at these premises. On June 6, 1955, there was a disastrous fire at the premises which caused the deaths of both Green and Russell. As a result of this the plaintiff started the present proceedings. The defendant admitted liability but took third party proceedings, which were settled out of court, and this court is not concerned with them. It was agreed between the plaintiff and the defendant that the sum to be awarded as damages to the plaintiff should be £1,300, but subject to an issue which was argued before the judge, and which is the subject of the present appeal.

The point arises in this way. In the year 1951 Russell took out a group accident insurance policy with the Yorkshire Insurance Co. Ltd., in respect of certain members of his staff, including Green. The accident which caused the death of Green was covered by the policy in the sum of £1,000, and following upon his death a claim for this amount arose and was met by the company. The sum was paid to the defendant as representing the estate of her son, who was "the insured" under the policy. The question is whether this sum of £1,000 (which has been or is in the course of being paid over by the defendant to the plaintiff) falls to be deducted from the agreed damages of £1,300 by virtue of the provisions of section 1 of the Fatal Accidents (Damages) Act, 1908. The judge held that the sum was not deductible, and it is against that decision that the defendant has appealed.

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[1] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

The judge arrived at certain findings of fact which are relevant to the issue now before us in certain of its aspects, and he expressed them in the following terms[2]: "It is to my mind "plain that the terms of their" (namely, the employees named in the policy) "employment did not include any provision in "regard to the policy. There was nothing in those terms which "resembled the provisions contained in the booklet issued by "the employers in *Bowskill* v. *Dawson* (*No. 2*).[3] On the other "hand, I think that the existence of the policy was known to "Mr. Russell's employees in such a manner as to create in "their minds a reasonable expectation of benefit for themselves "or their dependants in the event of their being injured or "killed. I should perhaps add, in view of a point taken in the "course of the argument in reply to Mr. Van Oss, that I can "find nothing which would justify the inference that the possi-"bility of benefit under the policy affected the employees' atti-"tude in regard to their employment; there was nothing to show "that they refrained from giving notice or from asking for an "increase in salary in consideration of the benefits which come "to them from the policy, nor was there anything to show that "Mr. Russell undertook an obligation to maintain or renew the "policy."

These findings of the judge were not challenged before us by either side, and it follows from them, in my judgment, that the £1,000 now in question would clearly have to be brought into account by the plaintiff, as a benefit arising out of her son's death, against the loss which she has sustained by reason of his death unless she is able to rely on section 1 of the Fatal Accidents (Damages) Act, 1908: *Baker* v. *Dalgleish Steam Shipping Co.*[4]; *Jenner* v. *Allen West & Co. Ltd.*[5] [His Lordship read section 1 of the Act of 1908 and continued:]

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[2] [1959] 1 Q.B. 28, 38; [1958] 3 W.L.R. 371; [1958] 3 All E.R. 44.

[3] [1955] 1 Q.B. 13; [1954] 3 W.L.R. 275; [1954] 2 All E.R. 649.

As the result of this appeal depends, in my judgment, primarily upon the terms of the policy which Russell effected with the Yorkshire Insurance Co. Ltd., I will refer now to its provisions in some little detail. It is described as a personal accident group policy, and has a recital: "Whereas the insured "is desirous of securing payment of benefits as hereinafter set "forth to any insured person in the event of his sustaining "accidental bodily injury as hereinafter provided, and by a "proposal and declaration, which shall be the basis of this "contract and be deemed to be incorporated herein, has applied "to the company and has paid or agreed to pay the premium "as consideration for such insurance during the period of in-"surance or during any period for which the company may "accept payment for the renewal of this policy." Then the policy witnessed: "That subject to the terms of exceptions and "conditions contained herein and of any endorsement hereof if "at any time during the currency of this policy any insured "person shall sustain bodily injury caused by violent accidental "external and visible means and such injury shall as the direct "sole cause thereof and independently of all other causes within "three calendar months from the occurrence thereof: section "A:—Result in death the company shall pay the sum insured "stated against section A in the schedule. Section B:—Result "in the loss by physical severance of one or both hands or "one or both feet or the complete and irrecoverable loss of "sight of one or both eyes the company shall pay the sum "insured stated against section B in the said schedule. Section "C:—Totally disable the insured person from engaging in or "attending to his usual occupation but shall not entitle him to "the sum insured under section B the company shall pay for "such total disablement the sum insured per week stated against "section C in the said schedule. Section D:—Partially disable "the insured person from engaging in his usual occupation but "shall not entitle him to the sum insured under section B the "company shall pay for such partial disablement the sum in-"sured per week stated against section D in the said schedule."

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[4] [1922] 1 K.B. 361; 38 T.L.R. 245.

[5] [1959] 1 W.L.R. 554; [1959] 2 All E.R. 115.

Then there follow a proviso and exceptions to which I need not refer.

Then certain conditions are stated. It says: "This policy "and the schedule shall be read together as one contract and "any word or expression to which a specific meaning has been "attached in any part of this policy or of the schedule shall "bear such specific meaning wherever it may appear." Then there follow eight conditions of which I need mention only condition 5 and condition 8. Condition 5: "The company shall "be entitled to treat the insured as the absolute owner of this "policy and shall not be bound to recognise any equitable or "other claim to or interest in the policy and the receipt of "the insured or the insured's legal representative alone shall "be an effectual discharge." Condition 8: "The due observance "and fulfilment of the terms conditions and endorsements of "the policy in so far as they relate to anything to be done or "complied with by the insured or any insured person and the "truth of the statements and answers in the said proposal shall "be conditions precedent to any liability of the company to "make any payment under this policy."

Then under the schedule to the policy the insured is described as "Arthur H. Russell." Certain dates then appear, including dates of the period of insurance, and the renewal date. Then follows a list of the insured persons, and they include Russell himself. Opposite the name of each insured person under sections A, B, C, D and E respectively, there are sums mentioned, some capital and some weekly sums, which are payable on the happening of the insured risks. Then it is stated: "The "weekly benefits under sections C and D are payable collectively "for 100 weeks." The first premium is stated to be £24 18s. 9d., and the annual premium is the same amount.

Then there are some endorsements to the policy, and I need refer only to two, both of them dated September 7, 1951. The first one states: "It is hereby declared and agreed that in "addition to the weekly compensation payable under sections "C and D, the company will reimburse the medical expenses "necessarily incurred by any insured person up to an amount "not exceeding 15 per cent. of such weekly compensation." The other endorsement of the same date says: "Notwithstanding "anything herein contained to the contrary it is hereby declared "and agreed that the following section is added to the policy: "Section E:—Permanently and totally disable the insured person from engaging in business of any kind but shall not entitle "him to the sum insured under section B, then on the expiration "of one hundred weeks from the date of such injury the company shall pay the sum insured stated against section E in "the schedule."

The judge decided the question in issue in the plaintiff's favour mainly on the ground which he expressed as follows[6]: "In my judgment the expression 'paid or payable on the death "'of the deceased under any contract of insurance' is descriptive of the sum itself and does not involve by implication the "corollary that the sum was paid or payable to the deceased "under the contract of insurance. Moreover, I think that force "is lent to this view by the double use of the word 'any'; any "sum, any contract of insurance."

The plaintiff had further contended that Green and the plaintiff, as his personal representative, had a right enforceable in equity to receive payment of benefits under the policy, and submitted, alternatively, that Green and the plaintiff had contractual rights at common law in relation to the policy which the courts would enforce. The judge rejected the first of these contentions, but did not decide the second. Both of them are raised before us by a respondent's notice, which we gave the plaintiff leave to introduce at the close of the appellant's argument.

I think it is convenient at the outset to consider whether Green in his lifetime had any legal or equitable interest in the moneys which would become payable under the policy upon his death. The contention that he had a legal interest was founded upon the submission, as stated by the judge in his judgment: "that inasmuch as the sums payable under the policy were in "the light of the recital paid for the benefit of (inter alios) "Mr. Green he or his personal representatives had a right at "common law to claim the sums even though he was not a "party to the contract." This view, upon which the judge found it unnecessary to express a concluded opinion, is supported by passages in the judgments delivered by Denning L.J. in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*[7] and in *Drive Yourself Hire Co. (London) Ltd.* v. *Strutt*[8] respectively. In both those cases the Lord Justice, after a review of the authorities dealing with the matter, accepted as still surviving the principle that a person interested can sue on a contract expressly made for his benefit—and that apart altogether from section 56 of the Law of Property Act, 1925, upon which the plaintiff in the present case does not rely.

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[6] [1959] 1 Q.B. 28, 41; [1958] 3 W.L.R. 371.

[7] [1949] 2 K.B. 500, 513; sub nom. *Smith* v. *River Douglas Catchment Board* (1949) 65 T.L.R. 628; [1949] 2 All E.R. 179.

[8] [1954] 1 Q.B. 250, 269; [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.

As is pointed out in Chitty on Contracts, 21st ed., vol. 1, p. 62, Denning L.J. did not, when reviewing the earlier decisions, make any reference to *Bourne* v. *Mason*[9] or to *Price* v. *Easton*,[10] in both of which cases it was held in effect that a stranger to a contract could not sue upon it. Had these decisions been present to the Lord Justice's mind, it is possible that they might have affected his opinion on the matter. However that may be, there is authority binding upon this court which, in my judgment, precludes us from deciding the point now under consideration in the plaintiff's favour. In *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[11] the appellants brought an action for breach of a contract made between the respondents and a third party which contained terms as to the re-sale of goods of the appellants' manufacture. It was held that the contract was unenforceable at the suit of the appellants. "In the law "of England," said Viscount Haldane L.C.,[12] "certain principles "are fundamental. One is that only a person who is a party to "a contract can sue on it. Our law knows nothing of a jus "quaesitum tertio arising by way of contract. Such a right "may be conferred by way of property as, for example, under "a trust, but it cannot be conferred on a stranger to a contract "as a right to enforce the contract in personam." So also in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York*[13] Lord Wright, in delivering the judgment of the Judicial Committee, said[14] that "no doubt at common law no one can "sue on a contract except those who are contracting parties and "(if the contract is not under seal) from and between whom "consideration proceeds"; and he cited the above passage from Lord Haldane's speech in the *Dunlop Pneumatic Tyre Co.* case.[15] Accordingly, on the authorities as they stand, it seems clear to me that Green had no right at common law to claim under the contract of insurance into which the company entered with Russell, and for which Green himself gave no consideration.

The next question, then, which arises is whether Green had an equitable interest in the policy, and in the sum which was paid on, and in respect of, his death. The plaintiff contends that Russell constituted himself a trustee for the various employees (including Green) named in the schedule to the policy in respect of the benefits attributable to each of them respectively. The judge rejected this contention and, in my opinion, rightly so. The suggestion that Russell assumed the position and obligations of a trustee was based primarily on the recital to the policy which I have already read and will not read again. I take the following definition of a trust from Underhill's Law of Trusts and Trustees, 10th ed., p. 3: "A "trust is an equitable obligation, binding a person (who is "called a trustee) to deal with property over which he has "control (which is called the trust property) for the benefit of "persons (who are called the beneficiaries or cestuis que trust), "of whom he may himself be one, and any one of whom may "enforce the obligation. Any act or neglect on the part of a "trustee which is not authorised or excused by the terms of the "trust instrument, or by law, is called a breach of trust."

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[9] (1669) 1 Vent. 6.

[10] (1833) 4 B. & Ad. 433.

[11] [1915] A.C. 847; 31 T.L.R. 399.

[12] [1915] A.C. 847, 853.

[13] [1933] A.C. 70; 49 T.L.R. 90.

[14] [1933] A.C. 70, 79.

[15] [1915] A.C. 847, 853.

In my judgment, no such conception as that described by Sir Arthur Underhill arises from the recital to the policy. An intention to provide benefits for someone else, and to pay for them, does not in itself give rise to a trusteeship; and yet that is all that emerges from the recital. Nor does the judge's finding that the existence of the policy was known to the employees in such a manner as to create in them a reasonable expectation of benefit affect the matter. There was nothing to prevent Russell at any time, had he chosen to do so, from surrendering the policy and receiving back a proportionate part of the premium which he had paid. Nor was he under any obligation to pay the renewal premiums each year. The truth is that the benefits payable in pursuance of the policy were sums which the company would become contractually liable to Russell to pay if the insured risks matured; and as Lord Greene M.R. said in *In re Schebsman*,[16] to which the judge referred: "It is not legitimate to import into the contract "the idea of a trust when the parties have given no indication "that such was their intention. To interpret this contract as "creating a trust would, in my judgment, be to disregard the "dividing line between the case of a trust and the simple case "of a contract made between two persons for the benefit of a "third."

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[16] [1944] Ch. 83, 89; 60 T.L.R. 128; [1943] 2 All E.R. 768.

Apart from the recital in the policy, the plaintiff relied to some extent on a letter which the defendant's solicitors wrote to her solicitors on June 16, 1955. It was suggested that this letter recognised the existence of a trust affecting the £1,000 in question in favour of Green's estate. In my judgment, no such significance can be attributed to this letter. The writer of the letter was, in my opinion, inaccurate in saying that under the policy the £1,000 "would appear to be payable to the estate of the "above named (A. W. Green deceased) in consequence of his "death," but there is no doubt but that part at least of Russell's intention in effecting the policy was to secure benefits to his employees on the happening of certain contingencies, and the object of that letter was to carry such intention into effect. The annual payment of premiums by Russell, on which the plaintiff placed some reliance, was also referable to such intention and is quite insufficient, as I think, to support the conclusion that Russell had assumed the obligations of a trustee in relation to the policy.

It follows, therefore, that Green had, in my judgment, no right, whether at law or in equity, to claim under the policy, and the only question which remains is whether, nevertheless, the plaintiff, as Green's administratrix and dependant, can on other grounds claim exemption from accountability for the £1,000 by virtue of section 1 of the Act of 1908. The question in general whether sums which are paid under a contract of insurance on an employee's death, and in respect of which the employee had no more than an expectation of benefit which, in fact, materialises, fall within the Act was left open by this court in *Bowskill* v. *Dawson (No. 2)*.[17] It was unnecessary to decide the point in that case because the court held that the employees had an equitable interest in the policy moneys there in question, and that such an interest was sufficient to attract the operation of the Act of 1908. In my opinion, it is not necessary (even if it were possible), to answer the question in its general form in the present case; for, in my judgment, the plaintiff's rights fall to be determined mainly upon a consideration of the terms of the policy which Russell effected with the company, though the judge's finding as to the employees' knowledge of the policy and of their possible benefits under it is, perhaps, of some relevance.

Counsel for the plaintiff relied principally before us on the ground which commended itself to the judge and to which I have already referred. Section 1, said Mr. Everett, is descriptive of a

[17] [1955] 1 Q.B. 13.

particular category of money, namely, money paid or payable on the death of the deceased under any contract of assurance or insurance. The submission is that once a sum representative of that category is paid it bears, as it were, a label, and is thenceforth identifiable in the same way as, for example, a piece of jewellery would be. Therefore, it is said, upon payment by the insurance company to the defendant of the £1,000 in question, it became irrevocably stamped as a section 1 payment, notwithstanding that under the contract it was neither paid nor payable to Green or his estate, with the result that if by any means it should subsequently be received by the plaintiff, she could claim the statutory exemption for it which is conferred by the Act.

For myself, I find some difficulty in accepting this proposition. On the hypothesis that neither Green nor his estate had any legal or equitable title to or interest in the £1,000, it is clear that the sole legal and beneficial ownership of this sum would have become vested in Russell had he survived. Supposing he had put it on deposit account at a bank, enjoyed the interest on it during his life, and then bequeathed it by will to the plaintiff, then, according to her argument, on Russell's death the £1,000 received by the plaintiff would be within the scope of section 1. It is, of course, true that in such circumstances the plaintiff would not have to give credit for it, if only because the bequest might well not have been made by Russell when she claimed her damages; but I have used the illustration for the purpose of testing the "labelling" theory, and, in my opinion, the money receivable by the plaintiff in the events supposed would be a legacy and nothing else. The theory would also lead to great complication and difficulty where insurance money passed through several hands before finally reaching the estate of the deceased employee or his dependants, or where the insured, as legal owner of the money, invested and reinvested it. As I say, therefore, I am unable for myself to accept this proposition of the plaintiff's.

I am, however, of opinion that the plaintiff is entitled to the benefit of the Act of 1908 for a different reason. As I ventured to observe in *Bowskill* v. *Dawson (No. 2)*,[18] section 1 leaves something to the imagination. It envisages the payment of money on the death of the deceased under an insurance contract, but is silent as to the identity both of the payer and of the payee. The payer would normally be the insurer having regard to the words "paid under any contract of assurance or insurance." As to the payee, it seems clear that as the payment is relevant to the assessment of damages under the Fatal Accidents Acts, the payee or payees envisaged by the section must mean the estate or dependants of the deceased employee. Now if the payments contemplated by the section were to the estate or dependants direct, then, as it seems to me, the plaintiff in the present case could not succeed; for the section is dealing with sums paid or payable " under " a contract of insurance, and under the contract into which Russell entered with the Yorkshire Insurance Co. the £1,000 was payable and was paid to the defendant, and not to the plaintiff. It was, indeed, argued for the plaintiff that the company could have paid the money to the plaintiff direct, and then called upon the defendant to give them a receipt for it under condition 5. I do not accept this, however, for " the insured " under the contract and the person who paid all the premiums was Russell and no-one else. Nevertheless, I do not think that section 1 was envisaging only payments made directly to the employees or their dependants, but extends to payments contractually made to or on behalf of or for the benefit of the employees or dependants.

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[18] [1955] 1 Q.B. 13.

In *Bowskill* v. *Dawson (No. 2)*[19] payments were held to be within the Act of 1908 which were made by the insurers to trustees on behalf of the employees; and, in my opinion, it would be within the language of the section, and the general sense of the legislation, to hold that if sums are received by an employer under a scheme which was designed for the benefit of the employees, but without conferring any enforceable right on them, and he pays the sums over to the estates or dependants of the men when the risk matures, then the provisions of the Act apply. That the policy which Russell effected for members of his staff in 1951 and thereafter maintained was intended by him to benefit those members is not open to question. The recital of the policy expressly reveals such an intention. The schedule mentions the members concerned by name, and specifies the capital or weekly sums payable in respect of each of them on the happening of the insured contingencies. The weekly sums payable in respect of each " insured person " are described in the schedule as " the weekly benefits." Sections C and D of the policy refer to the insured persons in terms of entitlement, as also does one of the indorsements dated September 7, 1951. Another indorsement of the same date provides that the company " will reimburse " the medical expenses necessarily incurred by any insured " person " up to a prescribed amount.

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[19] [1955] 1 Q.B. 13.

In these circumstances, it is clear that part, at least, of Russell's intention in effecting and maintaining the policy was to benefit his employees, and the defendant has now implemented that intention in favour of Green's estate. It would, in my judgment, be an undue restriction on the language used in section 1 to hold that it does not apply to the terms and provisions of Russell's policy, and to the facts of the present case. In my opinion the section does apply, and I would accordingly dismiss the appeal.

PEARCE L.J. In this case, the defendant, Mrs. Russell, received £1,000 from the Yorkshire Insurance Co. as a result of Green's death and paid it over, or is in the course of paying it over, to the plaintiff. For the defendant, it is contended by Mr. Van Oss that the £1,000 so paid to the plaintiff must be taken into account and deducted in assessing the damages payable to her under the Fatal Accidents Act, 1846, in respect of Green's death. The £1,000 is not, he argues, excluded from being so taken into account by the Fatal Accidents (Damages) Act, 1908, since it is not "any sum paid or payable on the "death of the deceased under any contract of assurance or "insurance." Admittedly, the £1,000 paid by the insurance company to the defendant came within that definition; but thereby payment under the contract was exhausted, and the payment made by the defendant to the plaintiff did not constitute a payment under any contract of insurance. It was, he argues, a payment made by the defendant purely of her own volition. It is assumed for the purposes of this argument that the judge was right in holding that (whatever her moral claims might be) the plaintiff had no enforceable right to the £1,000 in law or in equity.

The policy is a personal accident group policy. It provides for various benefits for various persons in the event of accident. By its form it is clearly intended as a means whereby one policy holder can secure such benefits for several persons, the policy holder being the person to whom the insurance company looks for payment of premiums, and the person whom it is entitled to treat as the absolute owner and as the recipient of the various benefits arising under the policy.

The policy starts with the recital: "Whereas the insured is "desirous of securing payment of benefits as hereinafter set forth "to any insured person in the event of his sustaining bodily injury "as hereinafter provided." I read the word "secure" in the context as meaning to provide or obtain for the insured person.

I do not accept the contention that the word means "obtain for "himself the money so that it will be safely available if and when "he himself of his volition wishes to benefit the insured persons." The use of the words "secure to" any insured person indicates an intention that the insured person shall certainly receive it. The policy then provides that, if any insured person shall sustain bodily injury caused by accident, and this results in death, "the "company shall pay the sum insured stated against section A "in the schedule." The sum stated against Green's name in section A in the schedule (which is expressly said to be part of the contract) was £1,000 in the event of death.

It will be observed that the policy clearly takes cognisance of Green, as a named individual, coming within the class of insured persons (a class whose due observance of certain things is expressed in clause 8 to be a condition precedent to the insurance company's liability to pay), and that the benefit secured to him is a payment of £1,000 under the policy in certain circumstances. Clause 5 by implication recognises the fact that other persons than the policy holder may have some equitable or other claim or interest in the policy. As a matter of machinery the company by that clause unilaterally reserves to itself the right to treat the insured as the absolute owner of the policy, and to be effectually discharged by his receipt (or that of his legal representatives). It would obviously be inconvenient to have the various insured persons making their own claims and dealing with the company direct.

From the terms of the policy, therefore, the parties contemplate that the policy holder is securing benefits to a named person, Green, and that the insurance company will pay £1,000 on Green's death by accident. It is true that the company are entitled (as a matter of convenient machinery) to deal direct with the policy holder, and to treat him as if he alone were intended to get the benefits of all the insured persons. But the terms of the agreement as a whole make it clear that (whatever may be Green's legal or equitable rights against the policy holder) the £1,000 payable on Green's death is intended by the parties to be a benefit to Green's estate, and is not intended for the pocket of Russell. Moreover, I think that the terms of the agreement as a whole show that the parties envisage payment of the £1,000 direct to the policy holder and payment over by him to Green's estate.

Thus the second payment, namely, by the defendant to the plaintiff, is a payment envisaged by the contract, and is clearly in my view a sum paid under a policy of assurance within the terms of the Fatal Accidents (Damages) Act, 1908.

But I would prefer not to rest my decision on such narrow grounds, derived as they are from particular words in the policy. I think that the proper construction of the Act is that adopted by the judge, who said[20]: " As it seems to me there is no need " to strain the language in order to give effect to the plaintiff's " claim; on the other hand, to give effect to the defendant's " argument involves the notional inclusion in the section of " words of limitation restricting the scope of the section to " cases in which the deceased or his representative had some " enforceable right to ' the sum in question.' " And again[21]: " In my judgment the expression ' paid or payable on the death of " ' the deceased under any contract of . . . insurance ' is descrip- " tive of the sum itself, and does not involve by implication " the corollary that the sum was paid or payable to the deceased " under the contract of insurance. Moreover, I think that force " is lent to this view by the double use of the word ' any '; " any sum, any contract of insurance." I wholly agree with those observations.

Morris L.J. in *Bowskill* v. *Dawson* (*No. 2*)[22] said, in a passage on which the judge relied: " It is true that the deceased " was not a party to the contract of assurance, but it is to be " noted that the Act of 1908 refers to ' any ' contract of assur- " ance or insurance and appears, therefore, to cover and include " contracts of assurance or insurance other than those made with " the deceased. When it is sought to reduce the damages recover- " able by the relations of Mr. Dawson because of the receipt of " the sum of £3,300, it can in my judgment be shown that such " sum had the attribute or feature of being a sum paid on the " death of Mr. Dawson under a contract of assurance." Although he expressly left open the question raised by the present argument, those two sentences are, I think, rightly applicable to the case before us.

The Fatal Accidents Act, 1846, s. 2, provided, inter alia: " and in every such action the jury may give such damages as " they may think proportioned to the injury resulting from such " death to the parties respectively for whom and for whose " benefit such action shall be brought." The task was expressly left to a jury and was put in broad and simple terms. Subsequent cases established that in estimating such injury, actual and prospective gains as well as actual and prospective losses must be taken into account in order to arrive at the net loss. Where the man, whose death was the subject-matter of the claim, had kept up an insurance on his life, the payment under it would lessen the amount of damages recoverable by his widow. Thus the tortious defendant secured the benefit of his victim's thrift and foresight in place of the victim's widow for whom it had been intended. The object of the Fatal Accidents (Damages) Act, 1908, was to remove this injustice. By section 1, it provided that in assessing damages in any action under the Fatal Accidents Act, 1846, "there shall not be taken into account "any sum paid or payable on the death of the deceased under "any contract of assurance or insurance."

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[20] [1959] 1 Q.B. 28, 40.
[21] Ibid. 41.
[22] [1955] 1 Q.B. 13, 23.

It is obvious that in each case there must be an assured or insured person and a payer and a payee. It would have been possible to insert in the Act detailed provisions dealing with these matters. But the Act, deliberately as I think, dealt with the matter on broad lines as the original Act had done. It was excluding a certain type of consideration from the broad and difficult task which the jury had to achieve in each case. The legislature contented itself with describing the nature of the moneys that were not to be taken into account, without seeking to limit the exact path of those moneys or specifying from whom and by whom they had to be received. Since the Act introduced an exception to the general rule, I agree that the words must not be strained to achieve any meaning beyond their clearly avowed intention; but they are entitled to be read in their simple normal sense without any gloss or artificial restrictions. The view put forward by the defendant does in my view put an unduly restricted meaning on the words, and writes into the Act words that are not there.

Whether a sum comes within the definition in the Act read in its normal sense is a question of fact in each case, subject, of course, to the legal limitation that it may not be possible as a matter of law for a certain sum in a particular case to come within that definition. In my view, on the facts of this case, the £1,000 paid by the defendant to the plaintiff does come within that definition. It is, in the normal sense, money paid on the death of her son under a contract of insurance.

We have been pressed by Mr. Van Oss with endless difficulties that might occur unless his argument is accepted. He suggests that if money passing through several hands could still be said to be a sum paid under any contract of insurance, confusion would arise. However, I see no reason why such money should pass through several hands. And if it did, the court is left to decide whether, when it comes to the hands of the widow, it still sufficiently retains the quality of a sum paid on the death of the deceased under any contract of insurance. On the facts of this case, I see no difficulty in holding that the sum paid to the plaintiff did retain that quality.

I agree with the judge and with my Lords that the plaintiff had in respect of the £1,000 no right that was enforceable in law or in equity. *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*[23] compels us to hold that since she was not a party to the policy, she had no legal rights enforceable by action. Nor do the terms of the policy themselves suffice to create a trust which she could enforce in equity in a case like this where the insuring of the employee was purely voluntary, and was no part of the terms of his employment. She cannot, therefore, bring herself within the decision in *Bowskill* v. *Dawson* (*No. 2*).[24] But for the reasons I have given, she has no need to do so.

In my opinion the appeal fails.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Greenwoods; Abbott, Baldwin & Co.*

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[23] [1915] A.C. 847.

[24] [1955] 1 Q.B. 13.

R. & T. GLYNN EVANS AND OTHERS *v.* LIVERPOOL CORPORATION.

1959
April 22, 23.

Lord Parker C.J., Donovan and Salmon JJ.

Highway—Private street works—Abandonment of resolution to make up road—Whether later resolution valid—No notice of abandonment of prior resolution—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *ss.* 6, 7, 8, 11.

In September, 1931, an urban authority resolved, pursuant to section 6 of the Private Street Works Act, 1892, to make up a road. The formalities required in connection with publication of the resolution were complied with, and within the prescribed period objections were lodged on behalf of most of the frontagers. The authority took no steps to have those objections determined by a court of summary jurisdiction nor did they proceed with their proposal to make up the road. In April, 1948, the authority again resolved, pursuant to section 6, to make up the same road, the resolution containing no reference to the resolution of 1931. The resolution was duly published and within the prescribed period objections were lodged by certain of the frontagers. No steps were taken to have these objections determined, but on January 2, 1952, the authority resolved, pursuant to section 11 of the Act, to amend the estimate and the provisional apportionment of the probable expenses of making up the road. Objections were lodged by a number of frontagers, which objections the authority sought to have determined by a court of summary jurisdiction on May 9, 1958. At the hearing of the application the frontagers contended, inter alia, that in the circumstances the authority must be deemed to have abandoned the resolution of 1931 and could no longer seek to apportion the expense of the works amongst the frontagers; alternatively, that the resolution of 1931 was still in being and that, therefore, the resolutions of 1948 and 1952 were null and void. The magistrate considered that those resolutions were valid and dismissed the objections. On appeal:—

Held, (1) that abandonment of a resolution to make up a road under section 6 of the Act of 1892 did not preclude an urban authority from passing a further resolution to make up the same road in the future, for section 6 gave the authority an express power "from time to time" to resolve to make up a road and the Act contemplated that it should do so whenever public convenience and safety demanded.

(2) That the authority had in fact abandoned the resolution of 1931 and it was immaterial that the objections to that resolution had not been determined and that notice of abandonment was not given; accordingly the resolution of 1948 and the amending resolution of 1952 were valid and the frontagers were bound to pay the cost of making up the road.

Southampton Corporation v. *Lord* (1903) 67 J.P. 189; 1 L.G.R. 324, and *Faulkner* v. *Hythe Corporation* [1927] 1 K.B. 532; 43 T.L.R. 55 considered.

CASE STATED by the Liverpool stipendiary magistrate.

On May 9, 1958, there came before the magistrate an application by the respondents, the Liverpool Corporation, pursuant to the provisions of the Private Street Works Act, 1892, for the determination of objections lodged to proposals made under that Act by the corporation.

The following were among the facts proved or admitted before the magistrate. On September 17, 1931, the corporation resolved, pursuant to the provisions of section 6 of the Private Street Works

Act, 1892,[1] to make up the roadway known as Leinster Road in the City of Liverpool. The formalities required in connection with the publication of the resolution were duly complied with, and within the prescribed statutory period objections were lodged on behalf of all the frontagers of Leinster Road (save for frontagers occupying certain odd-numbered dwelling-houses). The corporation took no steps to have those objections determined by a court of summary jurisdiction pursuant to the provisions of the Act, nor did they proceed with their proposal to carry out the work of making up the road.

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[1] Private Street Works Act, 1892, s. 6: " (1) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works) . . . and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street . . . (2) The surveyor shall prepare . . . (*a*) A specification of the private street works referred to in the resolution . . . (*b*) An estimate of the probable expenses of the works; (*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith . . . Such specification, plans, sections, estimate, and provisional apportionment . . . shall be submitted to the urban authority, who may by resolution approve the same . . . (3) The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments, shall be published in the manner prescribed in . . . this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment within seven days after the date of the first publication. During one month from the date of the first publication the approved specifications, plans and sections (if any), estimates, and provisional apportionments . . . shall be kept deposited at the urban authority offices, and shall be open to inspection. . . ."

S. 7: " During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals . . . on any of the following grounds . . . (*d*) That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive . . ."

S. 8: " (1) The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on

[*cont. on p. 254.*

No.	1931		1948		1952	
	Objector	Particulars of Objection	Objector	Particulars of Objection	Objector	Particulars of Objection
Vacant land—Martins Bank	C. Williams & Sutcliffe, . . . agents for owner	The proposed works are unreasonable. The estimated expenses are excessive.	—	—	—	—
1–3 7–19	—	—	—	—	C. H. Edwards & Co., . . . agent for owner	Object to the increased cost being apportioned on the frontagers.
2–20	H. H. & J. Robinson, . . . agent for owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	H. H. & J. Robinson, . . . agent for owner	2, 4, 6, 12, 18 & 20. "There "had been some material in-"formality defect or error" in the inclusion of additional gullies for surface water drainage in the . . . proposals.
1–37 22–38	Daniel L. Evans, Esq., owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	—	—
39–55	—	— —	R. & T. Glynn Evans, . . . agent for owner	Expenditure contrary to government policy. Exec. of the work is unnecessary. The cost to the landlord is unreasonable. The proposed action is unfair and unreasonable.	R. & T. Glynn Evans, . . . agent for owner	Notice is invalid. Amended estimate is excessive and unreasonable. Amended provisional apportionment is unfair and unreasonable. Whole intention of the notices is unfair and unreasonable.

40–48	Mrs. Sophia Clarke, owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	—	—
52–54 & 58–74	F. M. Raine, . . . agent for owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	Thomas & Jones, . . . agent for owner	Point out they raised no objection in 1948 and object now to paying the increased assessment.
57–63 67–73	C. B. Collinson & Sons, . . . agent for owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	C. B. Collinson & Sons, . . . agent for owner	Point out the increased prices given in 1948, and object to paying the increases.
65	George Lewis, Esq., owner	The proposed works are unreasonable as being unnecessary at the present time. The estimated expenses are excessive.	—	—	—	—

On April 7, 1948, the corporation resolved pursuant to the provisions of the Act to make up Leinster Road. That resolution bore no reference to the resolution of September, 1931. The formalities required in connection with the publication of the resolution were duly complied with, and within the prescribed statutory period an objection was lodged by one of the present appellants on behalf of certain owners of odd-numbered properties. No steps were taken by the corporation to have the 1948 objections determined by a court of summary jurisdiction pursuant to the provisions of the Act.

On January 2, 1952, the corporation resolved, pursuant to section 11 of the Act, to amend the estimate of the probable expenses of the work of making up the road and the provisional apportionment of such expenses among the premises to be charged therewith. The formalities required in connection with the publication of this amending resolution were duly complied with, and within the prescribed statutory period objections were lodged by the appellants in respect of a number of dwelling-houses in the road, which objections were the subject-matter of the application by the corporation.

There was annexed to the case a table showing in respect of each of the resolutions particulars of the objections lodged on behalf of the respective owners and by whom they were so lodged (see pp. 252, 253).

There was also annexed to the case a bundle of documents and correspondence among which was a letter dated August 22, 1957, written by the corporation's town clerk to the agents of one of the objectors, containing the following passage: "Notices "under the [Private Street Works Act, 1892] were served upon "the frontagers first in 1931. A majority of owners then ob-"jected to the proposal and the City Council decided accordingly "to defer indefinitely the proposal to carry out the work. After

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"the application either of any ob-"jector or of the urban authority. "The court may also, if it thinks fit, "adjourn the hearing and direct any "further notices to be given."

S. 11: "The urban authority may "from time to time amend the speci-"fications, plans, and sections (if "any), estimates, and provisional "apportionments for any private "street works, but if the total amount "of the estimate . . . is increased, "such estimate and the provisional "apportionment shall be published in "the manner prescribed in . . . this "Act, and shall be open to inspection "at the urban authority offices at all "reasonable times, and copies thereof "shall be served on the owners of the "premises affected thereby; and ob-"jections may be made to the increase "and apportionment, and if made "shall be dealt with and determined "in like manner as objections to the "original estimate and apportion-"ment."

"the war, a fresh scheme was prepared and the statutory notices "under the above Act relating thereto, were served upon the "owners concerned on April 13, 1948. Objections to this new "proposal were made by certain owners and the work could not "be commenced."

On behalf of the frontagers it was contended that as the corporation had taken no steps to have the objections lodged to their resolution of September 17, 1931, determined by a court of summary jurisdiction the corporation must be deemed to have abandoned their proposal, so that they could no longer seek to apportion the expense of making up the road among the frontagers and the court thereby had no jurisdiction to determine the proposal before it on May 9, 1958; alternatively, that if it were found that the corporation had not abandoned the 1931 proposal but had indefinitely deferred it, they were under a duty to give public notice of such deferment and that their failure so to do deprived them of the right to utilise the provisions of the Act of 1892 and/or deprived the court of jurisdiction to determine the proposal; that the corporation were under a duty upon objections being properly lodged pursuant to the provisions of the Act of 1892 to apply to a court of summary jurisdiction to appoint a time for the determination of those objections; alternatively, that the proceedings in respect of the 1948 proposals were null and void and of no legal effect in that, the 1931 proposal being still in existence at the date of the 1948 proposal, the proceedings by the corporation in 1948 should have been by way of an amending resolution and an amended estimate in accordance with section 11 of the Act and, further, that by reason thereof the steps taken by the corporation in 1952 were also null and void and of no legal effect; and that in any event it was unjust, unreasonable and inequitable that the frontagers should be called upon to pay any sum greater than the estimated amounts to be paid by them in 1948, for such increase in the costs as had taken place since then had only arisen by reason of the delay on the part of the corporation to have the objections lodged in that year determined by a court of summary jurisdiction pursuant to the provisions of the Act.

On behalf of the corporation it was contended that they were in the case of each resolution entitled to apply to the court of summary jurisdiction at any time after the expiration of one month from the date of first publication of such resolutions and were under no duty to make any such application until there was reasonable anticipation of practical commencement of the

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work in the near future; that they were entitled to abandon proposals made under the Act having regard, among other factors, to objections which had been lodged and in particular were entitled to and did abandon their 1931 proposals; that they did not by such abandonment of their 1931 proposals bar themselves thereafter from time to time when the conditions of section 6 of the Act were satisfied from making resolutions in pursuance of the Act; that they were under no duty to give notice of the abandonment or indefinite deferment of their 1931 proposals; that on April 7, 1948, the conditions set out in section 6 of the Act were satisfied and the corporation's resolution of that date in pursuance of that section was valid; that the frontagers were less likely to be prejudiced by the resolution of April 7, 1948, than by an amendment of the 1931 proposals in view of the lapse of time, the probability of changes of ownership and the possibility of objecting on all the grounds set out in section 7, and not merely on those set out in section 11; and that the 1948 and 1952 proposals being valid by reason of the foregoing contentions and the provisions of the Act, the frontagers were bound in law to pay the cost of making up the road in the proportions set out in the apportionment of the estimated expenses dated December 13, 1951.

The magistrate was of the opinion that the corporation's resolution of January 2, 1952, amending the estimate and provisional apportionment referred to in the resolution of April 7, 1948, was valid, and that the frontagers' objections accordingly failed, and he dismissed the objections.

The frontagers appealed.

Andrew Rankin, for the appellant frontagers, referred to *Southampton Corporation* v. *Lord.*[2] Frontagers are entitled to have their objections to a proposal determined, and once objections have been lodged it is the duty of an urban authority to have them determined. Reliance is placed on *Faulkner* v. *Hythe Corporation*[3]; in that case it was held that application must be made for the determination of objections before the work was carried out, but Lord Hewart C.J. said[4] that under section 8 "it is the duty of the urban authority to apply to a court of "summary jurisdiction to appoint a time for determining the "matter of all objections made as in the Act mentioned, that is "to say, the urban authority must apply for objections to be

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[2] (1903) 67 J.P. 189; 1 L.G.R. 324.

[3] [1927] 1 K.B. 532; 43 T.L.R. 55.

[4] [1927] 1 K.B. 532, 537.

"heard to the proposed works," and Avory J. said[5] that in a case such as that the word "may" in section 8 "has to be "construed in a mandatory sense. That word is no doubt prima "facie used in the permissive sense, as there may have been no "objection raised and therefore no need for an application to the "court of summary jurisdiction. But it is clearly contemplated "that if an objection has been made under section 7 then the "urban authority shall apply to the court of summary juris-"diction, and in my opinion, if they fail to do so then the justices "have no jurisdiction at all to deal with anything relating to a final "apportionment." It is submitted that in a case such as this "may" in section 8 should be construed as "must," and that if an authority does not proceed to have objections determined within a reasonable time it cannot say that the objections are unreasonable but must be deemed to have accepted their validity and to have abandoned the resolution. The corporation in this case did not have the objections to the 1931 resolution determined, and that resolution must therefore be deemed to have been abandoned, at any rate in the sense that the corporation accepted the objections, and it cannot now seek to make up the road at the frontagers' expense.

If that is wrong, it is submitted that the resolution of 1931 is still in being and that in 1948 the corporation should have proceeded by way of amendment, and not de novo, so that the resolutions of 1948 and 1952 are of no effect. If a resolution to make up a street is abandoned, notice of abandonment must be given: see *Southampton Corporation* v. *Lord*,[6] *per* Mathew L.J.[7] Naturally, frontagers will not repair a street themselves if there is in existence a proposal by the urban authority to do so, and had there been notice of abandonment of the 1931 resolution the frontagers might well have made the street up themselves; but there was no notice, so the present state of the street may well have been induced by the conduct of the corporation. Further, an urban authority can act only by resolution and, therefore, once it has resolved to make up a street, there can be no abandonment by means of deferment of the proposed works on the part of its officials, but the original resolution remains in existence until it is properly rescinded or revoked by resolution of the authority.

David McNeill for the corporation. The corporation abandoned

[5] [1927] 1 K.B. 532, 539.

[6] 67 J.P. 189.

[7] Ibid. 191.

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the resolution of 1931. In *Southampton Corporation* v. *Lord*[8] it was not suggested that the passing of a second resolution within six months of the first without any formal notice of abandonment was improper or gave rise to any invalidity. Mathew L.J.[9] did not in fact say that notice must be given, and although in certain circumstances the making of a new resolution is in itself notice that a former proposal has been abandoned, it is not accepted that there is any obligation to give notice; certainly there is no such obligation after the expiry of a reasonable time for the determination of objections, because the resolution would then be deemed to have been abandoned. There is no requirement in the Act that notice be given if objections are considered successful. *Faulkner* v. *Hythe Corporation*[10] should be distinguished: in that case the urban authority had carried out the works before having the objections determined, and the observations of the court were directed to that situation.

Neither abandonment of a resolution nor failure to have objections determined precludes an urban authority from making a further resolution to make up the same street in the future. Section 6 of the Act gives an authority the express power so to resolve "from time to time": that envisages that they may make the resolution after abandoning a former resolution or even after work under a former resolution has been carried out: see *Barry and Cadoxton Local Board* v. *Parry*.[11]

Rankin in reply. *Barry and Cadoxton Local Board* v. *Parry*[11] turned on the rights of the frontagers under section 150 of the Public Health Act, 1875, and has no application to this case. Mathew L.J. in *Southampton Corporation* v. *Lord*[12] may well have had in mind that since an authority may only proceed by way of resolution, abandonment of a resolution would become public. But here the corporation's officials merely decided to defer the works indefinitely, and in such a case notice is necessary. Those frontagers who objected to the proposal of 1931 but not to that of 1948 cannot now be heard, since they may only object to the amendment of the estimate of probable expenses and their provisional apportionment upon the two grounds set out in section 11 of the Act. The consequence of the corporation having proceeded de novo in 1948, therefore, is to deprive of their rights those frontagers who assumed that the 1931 resolution was still in being.

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[8] 67 J.P. 189.

[9] Ibid. 191.

[10] [1927] 1 K.B. 532.

[11] (1895) 59 J.P. 421.

[12] 67 J.P. 189, 191.

LORD PARKER C.J. Salmon J. will give the first judgment.

SALMON J. On September 17, 1931, the respondents, the Liverpool Corporation, passed a resolution pursuant to section 6 of the Private Street Works Act, 1892, to make up a certain roadway, known as Leinster Road, in the City of Liverpool. [His Lordship referred to sections 6 and 7 of the Act of 1892 and continued:] The formalities provided for by section 6 were duly complied with by the corporation and an objection was made on behalf of certain of the frontagers concerned that the works were unreasonable and the estimated expenses excessive. Section 8 lays down the manner in which objections are to be heard and determined. [His Lordship read section 8 of the Act and continued:] The corporation, however, took no step to have the objections determined and nothing further occurred until April 7, 1948, when the corporation passed a fresh resolution to make up Leinster Road. This resolution was silent as to the 1931 resolution. The formalities required by the Act were duly complied with and objections were duly lodged on behalf of the owners of premises adjoining Leinster Road. No action was taken by the corporation to have those objections determined under section 8 of the Act and the next thing that occurred was that on January 2, 1952, the corporation resolved, pursuant to section 11 of the Act, to amend the estimate of the probable expenses of making up the road and the provisional apportionment of these expenses amongst the owners of the premises adjoining the road.

[His Lordship read section 11 and continued:] It is to be observed that under section 7 the objections to the original resolution may be made on any one of six grounds; under section 11 the objections to the amendments can be made on two grounds only. The formalities required in connection with the publication of the amending resolution were complied with, and objections were duly lodged on behalf of most of the frontagers concerned. The corporation waited until 1957 or 1958 and then applied for the determination of those objections to the stipendiary magistrate of the City of Liverpool, who ruled that the objections failed, and it is from that ruling that the frontagers now appeal.

The first point taken on the appellants' behalf is that the corporation must be deemed to have abandoned the resolution of 1931, and that that abandonment precludes it from passing any further resolution to make up the road. It is argued that the abandonment takes away the corporation's right under the Act of 1892, and that, if the corporation is to make up the road in future, it will have to do so at its own expense. It is a startling proposition that if an urban authority abandons a resolution for making up a road under this Act, it for ever loses its power in the future to pass another resolution under the Act for the purpose of making up the road. That argument seems to me to lead to very strange and, indeed, ridiculous results and to be contrary to the plain words of the section. It is to be observed that section 6 is an empowering section, and by its express words gives a power which the urban authority may exercise from time to time; indeed, the Act clearly by its language contemplates that whenever the urban authority considers that public convenience or safety demands that the road shall be made up, it shall exercise its powers. To say that because, for example, in the year 1893 the local authority had a scheme for making up the road which on objection was abandoned, it is for ever thereafter precluded from exercising the express powers given under section 6, seems to be contrary to the plain words of the statute. Supposing that in 1959 public convenience and safety clearly required that the corporation should exercise its rights under section 6 in respect of a certain road and the corporation duly passed a resolution under section 6, any person to be charged with the expense of making up the road under the Act could, if Mr. Rankin is right, successfully argue in an objection to the resolution by showing that, say, in 1893 there had been a proposal to make up this road which had been abandoned. I cannot believe that an argument that leads to such a strange result is right, particularly when it is directly contrary to the words of the statute. I should be reluctant to give effect to that argument unless I was compelled to do so by plain authority. There is no such authority, and, accordingly, in my view the argument fails.

The next point taken by Mr. Rankin is this. He says, in the alternative, that there was no abandonment of the 1931 resolution; that it is alive and that, therefore, the corporation was wrong in passing the resolution which it purported to pass in 1948; it should then not have started de novo but, since the resolution of 1931 was in being, the corporation should have proceeded by way of amendment under section 11 of the Act; accordingly, the resolution which it did pass is void and of no effect. This argument turns upon whether there was an abandonment or not. I do not pause to consider what the effect might be if there were no abandonment, since I take the view that there clearly was an abandonment and the question of what the position might be if there were none is not material. The argument proceeds on this basis. First of all, as I understand it, Mr. Rankin says that a resolution once made and objected to cannot be abandoned because section 8 of the Act is mandatory and imposes an obligation to have those objections determined by a court of summary jurisdiction. I think that that argument involves a misconception, and I do not consider that it is in any way supported by *Faulkner* v. *Hythe Corporation*,[1] upon which the appellants relied. In my judgment all that the Act lays down and all that that case states is that before the expense of making up the road can be recovered from the frontagers, their objections must be heard and determined by a court of summary jurisdiction. Moreover, that case is also an authority for the proposition that it is not permissible for a corporation to proceed with the works before the objections have been heard.

Then it is said that there was a letter written in August, 1957, to the representative of one of the objectors in which the town clerk stated as follows: "Notices under the above Act were "served upon the frontagers first in 1931. A majority of owners "then objected to the proposal and the city council decided "accordingly to defer indefinitely the proposal to carry out the "work." It is said that is a letter from the town clerk stating that the proposal was deferred indefinitely and that that letter is quite inimical to the view that the resolution was abandoned. I do not agree with that contention. I do not think that there is anything which prevents the corporation from abandoning a scheme set out in a resolution, say, in the year 1910 and then 20 or 30 years later making a fresh scheme by a new resolution. You abandon the scheme of 1910, but the proposal that the road may be made up when necessary is not abandoned; that is indefinitely deferred. Indeed, it seems to me that the Act, by stating in section 6 that the urban authority may from time to time pass a resolution, makes it impossible for an authority to resolve that it shall never pass any resolution in respect of making up the road. It is impossible to regard anything done by an authority as putting it out of its power ever in the future to exercise the powers expressly conferred upon it by the Act. The fact that in 1957 the town clerk said in a letter written to the frontagers that the proposal of 1931 was indefinitely deferred is not material on which it can successfully be argued that the resolution of 1931 has not been abandoned. On the facts of this case it is impossible to come to any view other than that the resolution of 1931 was abandoned. Nothing happened for 17 years and then in 1948 a fresh resolution was passed adopting a fresh scheme. It is as plain as possible on those facts that the corporation had indeed abandoned the resolution of 1931.

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[1] [1927] 1 K.B. 532; 43 T.L.R. 55.

Mr. Rankin seeks to derive some comfort from *Southampton Corporation* v. *Lord*,[2] and he relies upon an obiter dictum of Mathew L.J.[3] That case deserves to be examined in order to appreciate what Mathew L.J. meant when he spoke the words relied on. It appears that on April 14, 1897, a resolution was passed by the Southampton Corporation that a certain street should be sewered, levelled, paved, metalled, flagged, channelled and made good and properly lighted, and formalities were duly complied with by the preparation of the necessary specification, plans, sections, estimate and provisional apportionment. Then by resolution of July 28, 1897, those documents were duly approved without modification or addition. During the statutory period of one month the frontagers concerned delivered what was called a memorial of objections. It was an informal document which, amongst other things, set out the reasons why they desired that the proposals of the corporation should not be carried into effect. As a result of that memorial the corporation met again in October of 1897 and introduced a new scheme, which provided that the same road should have the work done to it which had been envisaged by the first scheme a few months earlier, but only for about half its distance, and that for the rest of its length the work should be confined to sewering the road. That new resolution was approved on December 22, 1897, by the corporation together with all the various specifications, plans, sections and apportionment in connection with it. The resolution of December 22 was duly published and no memorial or objection of any kind was made to the second scheme. The work was carried out and the corporation in the action sought to recover the appropriate expenses from the defendant, who was one of the frontagers. The point taken on behalf of the defendant was that there had been no abandonment of the first resolution, that the memorial which had been delivered on behalf of the frontagers was an objection under section 7 of the Act, and that, since that objection had not been adjudicated upon by a court of summary jurisdiction, the plaintiffs, the Southampton Corporation, could not recover from the defendant. The point taken on behalf of the corporation was that the first resolution confirmed in July had been abandoned; that no objection had been made to the second scheme approved in December of the same year, and, therefore, it could recover in the action. Alternatively, the corporation took the point that if the first scheme had not been abandoned and if the defendant was right in suggesting, as he did, that the second scheme of December must merely be regarded as an amendment of the first scheme, then the memorial was not an objection under section 7 and there was in any event, whichever scheme was looked at as the effective scheme, a scheme which had not been objected to, and, therefore, the works had been done pursuant to resolutions which had not been objected to and the plaintiffs were entitled to succeed.

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[2] (1903) 67 J.P. 189; 1 L.G.R. 324.

[3] 67 J.P. 189, 191.

Wright J. held that the scheme which was finally confirmed in July of 1897 had been abandoned. It seems that he held it had been abandoned on the ground that when the second scheme was confirmed in December, and had been duly advertised and had been served on the parties concerned, it was quite plain to anyone that the old scheme was not going forward, but that the corporation had abandoned it and was putting forward a new one in its place. The case which this court is considering is, of course, much stronger because this is not a case of a few months but of 17 years having elapsed between the two resolutions, and, as I have already indicated, it seems to me to be plain and obvious that no one in 1948, except by the exercise of a good deal of disingenuousness, could have been under any misapprehension about whether or not the 1931 resolution had been abandoned. Wright J., who was a great authority on this branch of the law, came to the conclusion that the first scheme had been abandoned, and it seems from that to follow that he was of the opinion that there was power to abandon it in the way in which the corporation abandoned it in that case. He also held that in any event the memorial did not constitute an objection under section 7, and on that ground also, abandonment or no abandonment, the defence failed.

When the case went to the Court of Appeal Vaughan Williams and Stirling L.JJ. expressed no opinion on the abandonment point because they were firmly of the view that in any event the memorial did not constitute an objection under the Act. Mathew L.J., who also came to the conclusion that the memorial did not constitute an objection under section 7 of the Act, said as follows, and this is the passage relied on by Mr. Rankin: "With reference to the other point, I desire to guard myself "against being supposed to yield to the argument that the local "authority cannot withdraw a scheme of this sort—that it cannot "by public notice served upon everyone intimate that the proceedings have been abandoned. I see no reason at present for "holding that such a course cannot be maintained, but it may "be a matter which may have to be discussed hereafter, and "discussed at length." It has been discussed in this court, and it has been suggested that Mathew L.J. was saying that a scheme, if it could be abandoned at all, could only be abandoned by express notice. I do not read that passage as meaning anything of the sort. I consider that all that Mathew L.J. was saying was that he was far from deciding that a scheme could not be abandoned, and then he gave an example of how it could be abandoned, and one of the obvious ways in which it could be abandoned, of course, was by direct notice. It is also interesting to observe that having said that, and having apparently expressly reserved the point, at the very end of his judgment he says [3]: "I "agree that the appeal must be dismissed, and I agree through-"out with the judgment of my brother Wright." Whether he meant the whole of the judgment, as he seems to say, I do not know; this is perhaps not a very exhaustive report, but I think that the proper way of looking at it is that the point was left open in the Court of Appeal but that the decision of Wright J. is quite inimical to the contention now being put forward on behalf of the present appellants. For my part I agree with Wright J.

It is said also, and this is the final point, that considerable hardship has been put upon these frontagers in that the corporation have waited and waited during a period in which costs were steadily mounting, and that now the work is to be done in 1959 when it will cost the frontagers very much more than it would have cost them in 1931 or even in 1948 or 1952. It may very well be that that is the case, but it hardly lies in the mouth of these appellants to complain. The corporation wished to do the work in 1931 and but for the objection of the appellants would presumably have done it then. It wanted to do the work again in 1948 and again the appellants objected. Then there was an amendment of the scheme in 1952 and there was a further objection by the appellants. It was conceded when this matter was before the magistrate that it was necessary and desirable that this road should be made up on the facts as they then existed.

The two points of law taken are, in my view, without any real foundation, and I would dismiss the appeal.

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[3] 67 J.P. 189, 191.

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Donovan J. I agree. I would add only this in deference to Mr. Rankin's argument. I think that on the facts it is indisputable that the 1931 scheme, by which I mean the proposal to make up the road according to a certain specification at a specified cost, was abandoned as a scheme. Mr. Rankin says that it follows that no new scheme can ever be proposed by the corporation except one which will be executed at its own cost. I have tried to understand why that consequence should follow as a matter of law, but I have failed. It seems to me to conflict with the plain terms of section 6 of the Act, which empowers the urban authority from time to time to resolve to do these works and serve the specification upon the frontagers with a view to recovering the cost from them. I also think that the magistrate came to a correct conclusion in this case.

Lord Parker C.J. I agree and there is nothing that I can usefully add.

Appeal dismissed.

Solicitors: *Purchase, Clark & Treadwell for Rollo & Mills-Roberts, Liverpool; Cree, Godfrey & Wood for T. Alker, Town Clerk, Liverpool.*

J. F. L.

DUNN *v.* BIRDS EYE FOODS LTD.

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April 29, 30.

Lord Parker C.J., Donovan and Salmon JJ.

Factory—Criminal liability—Dangerous machinery (fencing)—Duty to guard against acts reasonably foreseeable—Unfenced nip between conveyor belt and drum—Employee cleaning machinery in motion—No danger to operator—Whether duty to fence—Whether injury "in consequence" of contravention of Act—Whether lacerated hand "injury to health"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14 (1), 133, 152 (1).

By section 14 (1) of the Factories Act, 1937: "Every dangerous "part of any machinery . . . shall be securely fenced."

By section 133: "If any person . . . suffers any bodily injury, in "consequence of the occupier . . . of a factory having contravened "any provision of this Act . . . the occupier . . . shall . . . be "liable to a fine not exceeding £100 . . . Provided that (*a*) in the "case of injury to health, the occupier . . . shall not be liable to a "fine under this section unless the injury was caused directly by "the contravention . . . "

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A general labourer employed in a factory on the sanitation shift was engaged in cleaning an electrically-driven belt conveyor. Contrary to his instructions he set the machine in motion and endeavoured to clean it manually; while so doing his hand was caught and lacerated in a nip created between the moving belt and a revolving drum. The drum and belt could have been securely fenced by a fixed guard, but at the time of the accident were unfenced; had a guard been fitted it would have been possible to clean the machine. The construction of the machine was such that the operator was in no danger when operating it. The employee knew that it was wrong to turn the machine on, and the accident was his own fault. An information was preferred against his employers alleging that they had contravened section 14 (1) of the Factories Act, 1937, in that a certain part of dangerous machinery, the drum and belt, was not securely fenced and that in consequence of such contravention the employee had suffered bodily injury whereby they were liable to a fine as provided by section 133 of the Act. The justices accepted a submission for the employers that there was no case to answer and dismissed the information. On appeal by the prosecutor:—

Held, (1) that since there was an appreciable, although not a serious, risk that any member of the sanitation shift might have his hand caught if the machinery were set in motion while he was cleaning the conveyor belt or drum, the unfenced nip was a reasonably foreseeable cause of injury, and a dangerous part of machinery which there was a duty to fence under section 14 (1) of the Act and that, accordingly, at the time of the accident the employers were in breach of the section.

Dictum of Lord Reid in *John Summers & Son Ltd.* v. *Frost* [1955] A.C. 740, 766; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870 applied.

(2) That the accident to the employee was "in consequence" of that contravention within section 133 of the Act notwithstanding that it was due to his own fault, for had the machinery been fenced at the moment of the accident, the accident would not have occurred.

(3) That, on its true construction, proviso (*a*) to section 133 of the Act of 1937 applied to cases of injury to health such as disease, which formed only one class of the injuries covered by the words "bodily injury," and not to the class of injury occasioned by breaches of section 14 (1); the employers, therefore, could not rely on the fact that the direct cause of the accident was the employee's own carelessness, but, on the evidence before the justices were liable under section 133.

CASE STATED by Lancashire justices sitting at Liverpool.

An information was preferred by John Thomas Dunn, an inspector of factories, against the defendants, Birds Eye Foods Ltd., the occupiers of a factory at Lees Road, Kirkby, alleging that they, on August 22, 1958, contravened section 14 (1) of the

Factories Act, 1937, in that a certain dangerous part of the machinery, namely, the end drum with belt of the conveyor between the bean snippers and the washers, was not securely fenced, and that, in consequence of such contravention one James Malcolm Owens suffered bodily injury whereby the defendants were liable to a fine not exceeding £100 as provided by section 133 of the Act.[1]

The following were among the facts found by the justices: The premises in question were a factory within the meaning of the Factories Act, 1937, and the defendants were at all material times the occupiers thereof. On August 22, 1958, Owens was employed by the defendants as a general labourer on the sanitation shift, and at 11.20 p.m. on that day was engaged in cleaning a belt conveyor driven by an electric motor. The conveyor ran alongside a row of bean snipping machines and consisted of an endless belt 24 inches wide, stretched over two revolving drums. At one end of the conveyor (the left-hand end) the drum was 8 inches in diameter and the centre line thereof was 23 inches above the floor. To the right of the drum was a vertical table leg, the gap between the leg and the periphery of the drum at its nearest point being 3½ inches and at its farthest point 7⅛ inches. When the drum was revolving under power a nip was created between the periphery of the drum and the belt at the point where the belt first came into contact with the drum. The drum and belt could have been securely fenced by a fixed guard but were unfenced at the time of the accident. In front of the conveyor was an open space where Owens stood while cleaning it. There was ample room for a person falling to get his hand in contact with the drum. However, the operator of the machine was in no danger when operating it. At the time of the accident there were only about seven employees of the defendants on the premises, all of them engaged in the sanitation shift.

Owens had been instructed by the defendants not to clean machinery while it was in motion, and to use a brush for the purpose of dislodging particles from the drum. Notwithstanding his instructions, he switched the machine on for the purpose of cleaning it and proceeded to clean it while in motion under power. He started by endeavouring to clean the conveyor belt with water from a hose; finding that the hose was too short to reach the drum, instead of fetching a further available length of hose, he endeavoured to clean the left-hand end of the conveyor by swilling it down with water from a bucket. Finding that that means was ineffective for removing waste particles of beans from the drum, Owens put his right hand between the drum and the table leg and endeavoured to sweep the particles manually from the revolving drum. His hand was caught in the nip between the drum and the belt and was lacerated sufficiently severely to prevent him from working for four weeks. Owens had turned the machine on and left it in motion to save him walking up and down to the switch, and he did this knowing that it was quite wrong. The accident to Owens was his own fault. Had it been fitted with a guard the machine could have been cleaned in the following manner: the machine would have been stopped, the guard removed and the exposed portions of the machine cleaned; the guard would then have been replaced, the machine inched round to expose a previously unexposed portion of the machine, when it would have been stopped and the newly exposed portion cleaned, the guard then being replaced and the inching process continued, the guard being removed when the machine was stationary and replaced when it was put in motion until the whole of the machine had been cleaned.

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[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any "machinery . . . shall be securely "fenced unless it is in such a "position or of such construction as to "be as safe to every person employed "or working on the premises as it "would be if securely fenced . . ."

S. 133: "If any person is killed, "or dies, or suffers any bodily injury, "in consequence of the occupier or "owner of a factory having contravened any provision of this Act . . . "the occupier or owner . . . shall ". . . be liable to a fine not exceeding £100 . . . Provided that (*a*) in "the case of injury to health, the "occupier or owner shall not be liable "to a fine under this section unless "the injury was caused directly by "the contravention . . . "

S. 152 (1): "In this Act . . . "'Bodily injury' includes injury to "health . . . "

At the close of the case for the prosecutor it was submitted and contended for the defendants that there was no case to answer and/or that the information should be dismissed; that the part of the machinery in question was not a dangerous part of the machine under section 14 (1) of the Factories Act, 1937, and that there had therefore been no contravention of the section; and that, if there had been a contravention of the section, the bodily injury suffered by Owens had not been caused directly by such contravention.

It was contended by the prosecutor that a prima facie case had been made out that the defendants had contravened the provisions of section 14 (1) of the Act; that Owens had suffered bodily injury in consequence of that contravention by the defendants within the meaning of section 133 of the Act; and that, on the true construction of section 14 (1) the drum and belt constituted a dangerous part of the machinery at the point where a nip was created between them.

The justices then visited the factory and found that the belt was very slow-moving, very flexible, and its tension low; that to insert a hand in the space between the table leg and the drum a person would have to be in a stooping or kneeling position; and that it would be very improbable that the hand of a person falling would enter the space between the table leg and the drum owing to the smallness of the space and the height of it from the floor.

They were of the opinion that there was no case for the defendants to answer, and that the information should be dismissed, and accordingly they dismissed the information.

The prosecutor appealed.

S. B. R. Cooke for the appellant prosecutor. The nip created between the drum and belt was a dangerous part of machinery which there was a duty to fence under section 14 (1) of the Factories Act, 1937. In considering that it was improbable that the hand of a person falling would enter the space between the leg and the drum the justices appear to have applied the wrong test. Probability is not the right test: see *John Summers & Son Ltd.* v. *Frost*,[2] *per* Lord Reid.[3] Here the drum and belt were obviously dangerous. Had they been fenced at the time of the accident it could not have happened and, therefore, the injury to Owens was "in consequence" of the defendants' failure to provide a fence within the meaning of section 133: *Wraith* v. *Flexile Metal Co. Ltd.*[4]

Andrew Rankin for the defendants. The drum and belt was not a dangerous part of the machinery within section 14 (1). The operator of the machine was in no danger and, having regard to the position of the machine, no danger was reasonably to be anticipated from its use unfenced: see the view of Lord Cooper L.J.-C. in *Mitchell* v. *North British Rubber Co. Ltd.*,[5] cited by Lord Reid in *John Summers & Son Ltd.* v. *Frost*.[6] The test is foreseeability, and what the occupiers of a factory must have regard to is the situation at the time when the accident occurred. But here there was no foreseeable danger; there was no danger when the machine was not in motion and Owens had been told not to switch it on and should not have done so.

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[2] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

[3] [1955] A.C. 740, 766.

[4] [1943] K.B. 24; [1942] 2 All E.R. 549.

[5] 1945 S.C.(J.) 69, 73.

[6] [1955] A.C. 740, 766.

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If there was an obligation to fence the machine under section 14 (1), the injury to Owens was not "in consequence" of the failure to fence within the meaning of section 133. The section envisages that the contravention of the Act was the effective cause of the injury. The effective cause of the injury here was not the failure to fence but Owens' own negligence. Had there been a guard, Owens would have had to remove it in order to clean the machine and the accident would have happened just the same if he had set the machine in motion. *Wraith* v. *Flexile Metal Co. Ltd.*[7] should be distinguished, for had the machinery in that case been fenced there would have been no accident.

While the machine was stationary Owens could come to no harm, and in setting it in motion he himself created the situation in which the duty to fence arose. The words of section 133, "in consequence of the occupier or owner of a factory having "contravened any provision of this Act," are not apt to cover a case of a technical contravention by the occupiers which is wholly due to the fault of the person injured. Even if the injury was "in consequence" of the failure to fence the machine, it was not "caused directly" by it, and proviso (*a*) to section 133 applies. [Reference was also made to *Blenkinsop* v. *Ogden.*[8]]

[DONOVAN J. But the proviso is limited to cases of "injury "to health."]

Section 152 (1) defines "bodily injury" as including "injury "to health," and in the context of section 133 "injury to "health" must include physical injury: if it does not, it is difficult to see what injury the proviso would apply to, except perhaps injury arising as a result of breaches of sections 4 and 41. It is submitted that the proviso does apply. The justices found that the accident was due to Owens' own fault; his injury, therefore, was not "caused directly" by the breach of section 14 (1), and the defendants are not liable.

Cooke, in reply, referred to sections 130 and 137 of the Act of 1937. The duty under section 14 (1) is absolute and, had the information been laid under section 130, the defendants would have been guilty of an offence in that they had contravened section 14 (1). That contravention was a proximate cause of the injury to Owens: it is accepted that Owens' disobedience to orders and negligence was "a" cause of the injury, but the fact that he set in motion the series of events which resulted in the defendants' contravention of section 14 (1) does not prevent that contravention from being a cause, and the nearer of the two, of the injury or mean that the injury was not "in consequence" of it. The section must be applied strictly, and the proportion of blame to be attributed to the injured person is not a matter to be considered in relation to liability under section 133, although no doubt it would be taken into account by the court in considering the penalty to be imposed. But a dangerous part of machinery must be fenced, so that some element of blame must always attach to occupiers or owners. The purpose of section 133 is to provide for a higher penalty in cases where there has been a casualty as a result of a breach of the Act.

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[7] [1943] K.B. 24.

[8] [1898] 1 Q.B. 783; 14 T.L.R. 360.

There is a distinction between "bodily injury" and "injury "to health." "Injury to health" in proviso (*a*) to section 133 does not include an injury such as that suffered by Owens.

LORD PARKER C.J. I will ask Salmon J. to give the first judgment.

SALMON J. On September 25, 1958, the appellant, one of Her Majesty's Inspectors of Factories, preferred an information against the defendants before the justices for the County of Lancaster in the Petty Sessional Division of Liverpool County, under section 133 of the Factories Act, 1937.

At the conclusion of the appellant's case it was submitted on behalf of the defendants that there was no case to answer. The justices upheld that decision and dismissed the information, and this case now raises the question whether the justices came to a right decision in point of law.

The defendants are the occupiers of certain premises at Lees Road, Kirkby, in the county of Lancaster, which premises are a factory within the meaning of the Factories Act, 1937.

At 11.20 p.m. on August 22, 1958, James Malcolm Owens was employed in the factory on a sanitation shift. There were seven men on this shift and they were the only persons on the premises at the time. Owens was engaged in cleaning a belt conveyor driven by an electric motor. The conveyor ran alongside a row of bean snipping machines. It consisted of an endless belt 24 inches wide, stretched over two revolving drums, and about 27 inches above the floor of the factory. When the drums were revolving under power a nip was created between each drum and the belt at the point where the belt first came in contact with the drum. The drums and the belt could have been securely fenced by a fixed guard but were unfenced at the time of the accident. The operator of the machine was so placed that he was in no danger from any nip when he was operating the machine. Any member of the sanitation shift, however, might be in danger of having his hands caught in a nip if, for example, the belt were to be set in motion whilst it was being cleaned.

Owens had been instructed by the defendants not to clean machinery while it was in motion; but notwithstanding his instructions he switched the machine on for the purpose of cleaning it and proceeded to clean it whilst in motion under power. There were waste particles of beans on the drum, and instead of cleaning them off as he should have done with a hose or a brush, he tried to sweep them manually from the revolving drum. Not very surprisingly his hand became caught in one of the nips to which I have referred, and was hurt badly enough to prevent him from working for four weeks. Owens had turned the machine on and left it in motion to save himself walking to and from the switch, and he did this knowing it was quite wrong. The accident was his own fault. If fitted with a guard, the machine could have been cleaned in the following manner: The machine would have been stopped and the guard removed and the exposed portions of the machine cleaned. The guard would then have been replaced and the machine inched round to expose a previously unexposed portion of the machine. The machine would then have been stopped, the guard removed and the newly exposed portion of the machine cleaned and the guard then replaced and the inching process continued, the guard being removed when the machine was stationary and replaced when it was put in motion for the inching process until the whole of the machine had thereby been cleaned.

The prosecution was brought, as I have said, under section 133 of the Factories Act, 1937, which reads, so far as is material, as follows: "If any person is killed, or dies, or suffers any bodily "injury, in consequence of the occupier or owner of a factory "having contravened any provision of this Act or of any regula-"tion or order made thereunder, the occupier or owner of the "factory shall, without prejudice to any other penalty, be liable "to a fine not exceeding one hundred pounds." I need not read the rest of the main part of the section. There is a proviso, to which I shall presently refer.

It was alleged against the defendants that Owens had suffered bodily injury in consequence of the defendants having contravened the provisions of section 14 (1) of the Act, which relates to fencing. That section, so far as is relevant to this case, provides: "Every dangerous part of any machinery . . . shall be securely "fenced unless it is in such a position or of such construction as "to be as safe to every person employed or working on the "premises as it would be if securely fenced." The first question, therefore, that arises is whether or not the nip formed by the drum and the conveyor belt in which Owens caught his hand is a dangerous part of the machinery in the defendants' factory.

It is argued on their behalf that the nip was in such a position as to be as safe to every person employed or working on the premises as it would have been if securely fenced. To my mind, that argument is quite untenable. There is an appreciable risk, although perhaps not a very serious one, that any member of the night sanitation shift might have had his hand caught in the unfenced nip if the machinery were to be set in motion whilst he was cleaning the conveyor belt or drum. The unfenced nip may not have been a very probable cause but, in my judgment, it was a reasonably foreseeable cause of injury. Accordingly, at the time of the accident the defendants were in contravention of section 14 (1) of the Act: see *John Summers & Sons Ltd.* v. *Frost*,[1] *per* Lord Reid.[2]

The question then arises whether Owens' injury was in consequence of the defendants' contravention of the statute within the meaning of section 133. Mr. Rankin, who has urged every point that could be urged on the defendants' behalf, contends that as the accident was Owens' own fault in that, contrary to instructions and with full knowledge of the danger, he tried to clean the drum with his bare hands whilst it was in motion, his injury cannot be said to be in consequence of the machinery being unfenced. He says that the injury was solely in consequence of Owens' own fault. He argues that the contrary view is unreal because even if the defendants had fitted the nip with a guard it would not have made the slightest difference. Owens would have removed the guard to clean the drum and the accident would certainly have happened just as it did happen. I must confess that at first sight I was attracted by this argument, and I have every sympathy with the justices in accepting it. They certainly took the greatest trouble with this case and have stated it with admirable clarity. For my part, however, I have come to the conclusion that the argument that the injury to Owens was not in consequence of the defendants' breach of section

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[1] [1955] A.C. 740; [1955] 2 W.L.R. 825; [1955] 1 All E.R. 870.

[2] [1955] A.C. 740, 766.

14 ought not to be accepted. It is to be observed that this section imposes an absolute duty. Every time a dangerous part of any machinery to which the section applies is in motion unfenced the section is contravened. The nip was a dangerous part of the machinery to which the section applies and was unfenced at the time of the accident. At that moment, therefore, the defendants were in breach of the section and, but for that breach—that is to say, if at that moment the nip had been fenced—the accident would not have occurred.

In these circumstances it seems impossible to hold that the injury was not in consequence of the defendants' contravention of section 14. It is, in my judgment, no answer to say that in a civil action Owens' contributory negligence was such that he might have been held 90 per cent. or even 99 per cent. to blame for his injury. Even if the defendants had fitted a guard and Owens had deliberately removed it contrary to instructions, it would have made no difference to their liability under section 133. They would still have been in breach of their absolute duty under section 14 (1) at the moment of the accident, notwithstanding that the breach was occasioned solely by the fault of Owens. This breach would therefore have been a cause of the injury inasmuch as the accident would not have occurred if at the critical moment the nip had been fenced. The policy of the legislature seems to be to impose an absolute obligation upon the occupiers of factory premises so to arrange their affairs that accidents of this kind shall not occur however careless their servants may be. The provisions of the statute are rigorous and in the circumstances of this case impose an onerous burden and, indeed, considerable hardship, upon the defendants. These considerations, however, cannot affect the true construction of the statute although they provide a strong basis for mitigation which the justices will no doubt take into account.

Mr. Rankin took another point on behalf of the defendants with which I ought briefly to deal. He contends that even if the injury to Owens was in consequence of the defendants' contravention of section 14 (1), the proviso to section 133 applies, and accordingly the defendants are not liable under that section unless the injury to Owens was directly caused by that contravention. The proviso to section 133 reads as follows: "Provided "that (*a*) in the case of injury to health, the occupier or owner "shall not be liable to a fine under this section unless the injury "was caused directly by the contravention . . ."

I am disposed to agree that if the proviso applies the defendants would not be liable since, although the contravention of section 14 (1) was a cause, it was not the direct cause of Owens' injury. The direct cause was his own carelessness. In my judgment, however, the proviso does not apply to this case. The injury which Owens suffered was not an injury to health within the meaning of the proviso. These words are apt to describe a disease from which a workman may suffer as a result, for example, of a contravention of section 47, which deals with the removal of dust and fumes, but are not apt to describe a mangled hand suffered as the result of a contravention of section 14 (1). Section 133 imposes a liability if any person is killed or dies or suffers bodily injury in consequence of the contravention of any provision of the Act. The definition section of the Act, section 152, provides that " 'Bodily injury' includes injury to health," that is to say, disease, which the words "bodily injury" would not in my view otherwise cover. If the defendants' contention were right, one would expect the proviso to follow the words of the main part of the section and to read "in the case of bodily "injury there shall be no liability unless the injury was caused "directly by the contravention." The proviso, however, uses different language and, in my view, is confined to cases of injury to health which form only one class of the injuries covered by the words "bodily injury" and does not apply to the class of injury occasioned by breaches of section 14 (1). It is to be observed that this construction gives section 133 the same meaning as the corresponding sections of the Factory and Workshop Acts of 1878 and 1895. If in 1937 the legislature had intended to alter the law in this respect it would, in my view, have used the words "bodily injury" and not the words "injury to health" in the proviso to section 133.

For these reasons I would allow the appeal and remit the case to the justices with a direction that unless any further evidence is called on the part of the defendants the evidence now before them discloses an offence.

Donovan J. I agree, and in view of the very full judgment delivered by my brother, I have nothing to add.

Lord Parker C.J. I also agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Labour and National Service; Simpson, North, Harley & Co.*

J. F. L.

1959
May 7, 8;
June 5.

Lord Parker C.J., Donovan and Salmon JJ.

REGINA *v.* BARNSLEY LICENSING JUSTICES. *Ex parte* BARNSLEY AND DISTRICT LICENSED VICTUALLERS' ASSOCIATION AND ANOTHER.

Justices—Bias—Licensing—Pecuniary interest—Application for off-licence by co-operative society—Justices members of co-operative society—Whether pecuniary interest conclusive of bias—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 48 (4) (5).

An application for a spirits off-licence at a drug department was granted to a co-operative society by seven licensing justices, six of whom were members of the co-operative society. On a motion for an order of certiorari to quash the decision on the ground that the justices had a financial interest in the matter under consideration and therefore were disqualified under section 48 of the Licensing Act, 1953 [1]:—

Held, (1) that at common law a direct pecuniary interest, however small, raised a conclusive presumption of bias on the part of a justice disqualifying him from acting in the matter under inquiry.

Reg. v. *Rand* (1866) L.R. 1 Q.B. 230; *Rex* v. *Sunderland Justices* [1901] 2 K.B. 357; 17 T.L.R. 551 applied.

(2) (Salmon J. dissenting), that although the justices, who were members of the society were disqualified from acting by virtue of section 48 (4) of the Act of 1953, the effect of section 48 (5) was to oust the common law rule and to make an applicant for certiorari prove a real likelihood of bias whether by reason of pecuniary interest or otherwise, and in the present case the financial interest of the justices was not so substantial as to give rise to that likelihood; accordingly, the application failed.

Rex v. *Tempest* (1902) 86 L.T. 585; 18 T.L.R. 433; *Rex* v. *Kilkenny Justices* (1908) 42 I.L.T. 135, and *Reg.* v. *Handsley* (1881) 8 Q.B.D. 383 applied.

Per Salmon J. Section 48 (5) saved any act which would otherwise be invalid by reason only of a disqualification under the statute; it did not save any act done by a justice disqualified at common law.

APPLICATION for an order of certiorari.

The applicants, the Barnsley and District Licensed Victuallers' Association and the Barnsley and District Off-Licence Holders' Protection Association, applied for certiorari to quash a decision of the Barnsley County Borough Licensing Justices granting to Robert Murray of the Barnsley British Co-operative Society Ltd.

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[1] Licensing Act, 1953, s. 48: "(4) No justice shall act for any purpose under this Act in a case that "concerns any premises in the profits "of which he is interested . . . (5) "No act done by any justice disqualified by this section shall be "invalid by reason only of that "disqualification. . . ."

his application for a spirits off-licence at the Central Drug Department, Wellington Street, Barnsley.

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The grounds of the application were that one or more of the licensing justices who made the decision was a member of the Barnsley British Co-operative Society Ltd., and (a) had a financial interest therein and was thereby disqualified by section 48 of the Licensing Act, 1953; (b) was thereby disqualified by bias.

H. C. Beaumont for the applicants. The basis of the applicants' case is that no man should be judge of his own cause (*Dimes* v. *Grand Junction Canal* (*Proprietors*)[2]; Halsbury's Laws of England, 3rd ed., vol. 11, p. 67, para. 123). If that be right, the tribunal in this case was improperly constituted and without jurisdiction. The applicants are entitled to certiorari ex debito justitiae as aggrieved parties: Halsbury's Laws of England, 3rd. ed., vol. 11, p. 140, para. 265. It is not necessary to show that the justices were actually partial in this matter, but that they would seem to be so to the world at large. Reliance is placed on *Reg.* v. *Rand*[3]; *Reg.* v. *Farrant*[4]; *Reg.* v. *Camborne Justices, Ex parte Pearce.*[5]

Bias should be assumed from the financial connection of these justices with the co-operative society; that aspect is relied on primarily. Even without bias being inferred, however, the circumstances were such (all the justices being either members or connected with the society) that it is reasonable to suppose that bias existed, and the public would have been reasonably apprehensive of its existence. [Reference was made to *Rex* v. *Stafford Justices, Ex parte Stafford Corporation.*[6]]

The object of subsection (5) of section 48 of the Licensing Act, 1953, was to protect the general position and it does not affect the grounds on which certiorari will lie. It ensures that a decision of the justices will be treated as valid until it is set aside. The remedy of certiorari can only be taken away by express words: Halsbury's Laws of England, 3rd ed., vol. 11, p. 137, para. 257. The common law prevails, and certiorari is a common law remedy where bias has been established; it is submitted that on the facts of this case bias has been established.

John McLusky for the respondents. If the justices were disqualified at all it was a statutory disqualification and no more, because no attempt has been made to prove real personal bias of any sort. Direct pecuniary interest of itself is not to be taken to impart bias automatically.

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[2] (1852) 3 H.L.C. 759, 794.

[3] (1866) L.R. 1 Q.B. 230.

[4] (1888) 20 Q.B.D. 58.

[5] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850.

[6] [1940] 2 K.B. 33; 56 T.L.R. 623.

The society is a company registered under the Industrial and Provident Societies Act, 1893. Within the meaning of subsection (2) of section 48 of the Licensing Act, 1953, every one of the justices was a shareholder (and could have had no interest or dividend on purchases otherwise than as a shareholder); each of them had disclosed his shareholding at the annual meeting of justices on October 5, 1957. The justices, therefore, were not disqualified by subsection (2).

Even if the justices had been disqualified, certiorari could not issue if they were disqualified merely by section 48. Their decision cannot be challenged on the ground of disqualification by the section (subsections (5) and (7)), although it may be challenged on the ground of common law bias. Subsection (4) is not in point as it cannot have any application to the small shareholdings to be considered in this case. If a justice is appointed properly under subsections (2) and (3), any decision in which he takes part cannot be challenged. Subsection (5) ousts the common law remedy of certiorari, which will only lie if there is a likelihood of bias arising from something other than pecuniary interest. The justices in this case were properly appointed and, therefore, entitled to act even in matters in which there might be some small pecuniary interest.

The solicitor concerned should have objected to the justices; failure to take objection at the time is fatal: Griffiths' Guide to Crown Office Practice (1947), at p. 75; *Reg.* v. *Kent Justices* [7]; *Rex* v. *Williams, Ex parte Phillips*.[8] It is clear that the solicitor had knowledge of such facts as made it his duty to apply to the justices then and there that any of them who were in any way disqualified should not sit. It is sufficient if the solicitor had the means of knowledge.

This court cannot issue certiorari on the facts of this matter.

Beaumont replied.

Cur. adv. vult.

June 5. LORD PARKER C.J. The following is the judgment of DONOVAN J. and myself.

Mr. Beaumont moves in this case for an order of certiorari to bring up and quash a decision of the licensing justices for

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[7] (1880) 44 J.P. 298.

[8] [1914] 1 K.B. 608.

Barnsley given on March 5, 1959, whereby they granted an application by the Barnsley British Co-operative Society (hereinafter called " the society ") for a spirits off-licence at their central drug department in Barnsley. The society already holds a wine licence for the same premises.

There were two hearings in this matter. At the first on February 12 the justices apparently heard evidence and adjourned. Of the seven justices who then sat, five were members of the society and two were not. The spouses of these two justices were, however, members. At the second hearing when the application was granted seven justices sat, of whom six had sat on February 12. Of the total of seven justices, six were members and one was not. The husband of this one justice was, however, a member. The membership of the society is apparently so large and comprehensive that there is only one borough justice in Barnsley who (or whose near relative) is not a member, and that justice is a Member of Parliament.

The ground upon which the court is asked to quash the grant of a licence is that of bias on the part of the justices. It is not said that they acted dishonestly in any way or that they were in fact biased, but that their membership of the society (or the membership of their spouses), which attracts financial benefits, constitutes bias in law. We are told that for the year ended November 18, 1958, the total turnover of the society was some £12,000,000. Of this, £46,000 only represented the proceeds of the sale of wine, i.e., 0·36 per cent. of the total turnover. It is estimated that the new spirit licence will increase the trade by no more than £3,000 per annum. The justices concerned have small interests in the society by way of shares and loan deposits. The highest income that any one of them derived from these combined sources in the year ended November 1958 was £23.

The position of justices having a financial interest in concerns which brew or distil or sell intoxicating liquor has been the subject of specific provisions in various licensing Acts passed during the last century. (See section 60 of the Licensing Act, 1872, section 40 of the Licensing Consolidation Act, 1910, and now section 48 of the Licensing Act, 1953.) One may summarise the effect of the first four subsections of section 48 as follows: subsection (1) disqualifies a justice from acting for any purpose under the Act in the county or borough in question, or from being a member of the licensing committee for that county or borough, who is, individually or in partnership, a brewer or distiller or retailer of intoxicating liquor in that county or borough. Subsection (2) disqualifies a justice from being a member of the licensing committee or the confirming or compensation authority for that county or borough if he is a shareholder or stockholder in a company which brews or distils or retails intoxicating liquor in that county or borough, unless before appointment or reappointment he discloses his interest to the appointing justices. In fact, all the members of the licensing committee had duly disclosed their interests before their appointment. Subsection (3) provides that a person who has a beneficial holding of such shares or stock as aforesaid shall not be appointed or reappointed a member of such committee or authority as aforesaid, unless the justices appointing him or reappointing him are satisfied that the extent to which the company carries on the business of brewing, distilling or retailing intoxicating liquor is so small in relation to its whole business that the interest of the person concerned affords no reasonable ground for suggesting that he is not a proper person to be a member of the committee or authority.

Section 48 (4), which deals with a case where a justice is interested in specific premises, provides: "No justice shall act "for any purpose under this Act in a case that concerns any "premises in the profits of which he is interested, or of which he "is wholly or partly the owner, lessee, or occupier, or for the "owner, lessee, or occupier of which he is manager or agent: "provided that a justice shall not be disqualified under this "provision by reason of his having vested in him a legal interest "only, and not a beneficial interest, in the premises concerned "or the profits of them."

Accordingly, whatever may be the position under subsections (2) and (3), a person having such a beneficial interest in the premises as subsection (4) prescribes may not act for any purpose under the Act in a case which concerns those premises. In its context in subsection (4) the reference to profits of the premises is clearly, we think, an elliptical way of describing profits arising from any trade in making or selling intoxicating liquor carried on from the premises. Accordingly, the justices in the present case who were members of the society were, in our view, disqualified from acting under subsection (4).

Pausing there, it is said, and this we think is undoubtedly true, that certiorari would lie. As was said by Blackburn J. in *Reg.* v. *Rand*[1]: "There is no doubt that any direct pecuniary "interest, however small, in the subject of inquiry, does dis-"qualify a person from acting as a judge in the matter." Indeed,

[1] (1866) L.R. 1 Q.B. 230, 232.

this is a rule of law and not a matter merely giving rise to a presumption of bias. Thus, in *Rex* v. *Sunderland Justices*,[2] Vaughan Williams L.J. said: "If he (that is, a justice) has "personally a pecuniary interest or an interest capable of being "measured pecuniarily, the law raises a conclusive presumption "of bias. For reasons of policy, which hardly require explanation, "it is not thought convenient, where there is such an interest, to "go into the question whether he in fact acted partially or "impartially. A bias is presumed from the mere fact of the "existence of the interest."

The matter, however, does not rest there because section 48 (5), so far as it is relevant, provides that: "No act done by any "justice disqualified by this section shall be invalid by reason "only of that disqualification. . . ." Mr. Beaumont, for the applicants, contends that this subsection in no way affects the grounds on which certiorari will lie. It is only, he submits, a provision to ensure that unless and until the decision granting the licence is set aside, it shall remain and be treated as valid. Mr. McLusky, for the respondents, on the other hand, contends that its effect is to oust the remedy by way of certiorari on the ground of pecuniary interest, be that interest large or small. Only in the event of the likelihood of bias arising, otherwise than from pecuniary interest, will certiorari lie.

In our judgment neither of these submissions is correct. All the subsection does is, we think, to oust the rule of law enunciated in *Rex* v. *Rand*[3] and to make an applicant for certiorari prove a real likelihood of bias, whether by reason of pecuniary interest or otherwise. Indeed, this view has already been taken by this court in considering the corresponding provision in section 60 of the Licensing Act, 1872. Thus, in *Rex* v. *Tempest*, Lord Alverstone C.J. said[4]: "Then remains the further point, which is not with-"out difficulty. The fourth magistrate who was present at the "confirming sessions appears to have a share in Allsopps, and "it is not disputed he comes within the opening words of "section 60. The point we have to consider is whether the "licence is bad because he adjudicated upon it notwithstanding "the provisions of that section. The true meaning of the proviso "at the end of that section is not without difficulty. The words "are: 'No act done by any justice disqualified by this section "'shall, by reason only of such disqualification, be invalid.' It

[2] [1901] 2 K.B. 357, 371; 17 T.L.R. 551.

[3] L.R. 1 Q.B. 230.

[4] (1902) 86 L.T. 585; 18 T.L.R. 433.

"was argued by Mr. Hextall that comparing that with the "analogous provision in section 38, it meant to say that no "objection should be taken to the sale of liquor in that case, "acting under the licence, and if the question had arisen solely "under section 38, I think that there would be some ground for "that argument. But when you look at the actual language of "section 60, which creates the status of disqualification, it says "that: 'No act done by any justice disqualified by this section "'shall by reason only of such disqualification be invalid.' In "my opinion it is impossible to put such a limited construction as "that contended for. I think the words of the Act here occurring "in the proviso to a section creating a disqualification against "the doing of the act and creating a penalty, cannot be construed "so narrowly; that is to say, that the act was not intended "to be protected if that was the only disqualification. I would "further point out that this proviso would be no protection where "a case of actual bias was raised—where it is said that the "interest of the brewer is such that he would be biased. In that "case, of course, the section would not be wanted, but it is quite "plain to my mind that the section saying 'by reason only of "'such disqualification' means thereby what I may call the "technical disqualification created by the Act. But if any brewer "was to sit and the case made was that he was biased in fact, "or likely to be biased in fact, different considerations would "arise. Under all the circumstances I think neither of the objec- "tions are successful, and the rule must be discharged." Darling and Channell JJ. agreed.

The judgment of Palles C.B. in *Rex* v. *Kilkenny Justices* [5] is to the same effect. See also the judgment of the court (Field and Cave JJ.) in *Reg.* v. *Handsley* [6] on a somewhat similar provision, in which the following passage occurs: "Feeling ourselves thus "at liberty to exercise our own judgment in the matter, we are "of opinion that in cases like the present where such a section "as section 502 of this local Act exists, it is not enough to show "merely that an adjudicating justice is a member of the town "council, and, as such, has a pecuniary interest in the result of "the complaint or information . . . but that in order to disqualify "the justice it must be established that he has such a substantial "interest in the result of the hearing as to make it likely that "he has a real bias in the matter."

Accordingly, it seems to us that certiorari cannot issue in this case unless there is proved a real likelihood of bias whether arising from a substantial pecuniary interest or otherwise. Here there is no suggestion of the likelihood of bias arising otherwise than from pecuniary interest. Apart from the small interest payable on any shares or deposits, the justices who were members of the society could, it is said, look forward to buying their spirits more cheaply than in an ordinary retail shop if they so wished. What happens, of course, is that at the end of the accounting period a member of a co-operative society receives out of the profits of the society a dividend calculated not upon shareholding, but upon total purchases. The effect is thus to reduce the cost of those purchases.

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[5] (1908) 42 Ir.L.T. 134.

[6] (1881) 8 Q.B.D. 383, 386, 387.

Can it then be said that this financial interest is so substantial as to give rise to a real likelihood of bias? In our judgment it cannot. The total increase in trade which is anticipated to arise is, as stated above, only £3,000 per annum on a total turnover of £12,000,000. It is true that if the justices made purchases of spirits they would get the eventual rebates on those purchases. But here we do not know whether or to what extent any justice was a drinker of spirits. Finally, and this we think is conclusive, the co-operative society in fact have another branch only 250 yards away from the premises in question which already has a spirit licence. All the justices, therefore, were already in a position to get a rebate on purchases of spirits. Indeed, the application for certiorari has been rested on the view, which we have held to be wrong, that bias is to be conclusively presumed from the existence of the justices' pecuniary interest, and from nothing else. It was not contended that there was any risk of bias because of the size of their interest or because of any other ground. In the course of argument, however, Mr. Beaumont did accept a suggestion, which fell from Salmon J., that the opportunity to buy spirits at what, in effect, is a discount, might import a real risk of bias. With this we have already dealt.

Before leaving this part of the case, it should be mentioned that Mr. Beaumont relied upon the principle that the right to apply for certiorari on the ground of lack of jurisdiction can only be taken away by express words. In the present case, however, it is not a case of the statute purporting to oust the remedy, but of the statute investing a justice with jurisdiction which he would not otherwise have had.

There remains a point taken by Mr. McLusky for the respondents. The solicitor for the applicants, who opposed the application before the justices, has stated that before the application he thought it possible that some members of the bench were members of the society, so much so that he informally approached the clerk to the justices beforehand, who told him that such membership would not disqualify the justices from sitting. After the application was granted, the said solicitor deposes that from inquiries he made he is satisfied that the chairman of the bench was a member of the society and that, to the best of his knowledge, other members of the licensing committee were also members. Mr. McLusky argues that it was the duty of the said solicitor to confirm his suspicions at the hearing by asking the justices which of them was a member of the society, and, if he so wished, to make formal objection then. Since he failed to do so, he ought not to be allowed to take objection now.

It is true there is ample authority for the proposition that if an advocate has knowledge that a particular justice is or may be disqualified from sitting on a particular application, he should take the objection then and there and not, so to speak, keep it up his sleeve for future use, if necessary, in this court. It is not possible to say that this is such a case. No attack on the bona fides of the solicitor in question is here made; indeed, a tribute has been paid by the respondents to his integrity. Whatever he may have thought, it cannot be said that he had knowledge. Nor is there, so far as the court knows, a public register of members that he could consult. "Means of knowledge" does not include for this purpose the opportunity to put fishing questions to each member of the bench, which he might or might not answer. And, indeed, it would be an invidious task to force upon an advocate. In our view there is no substance in this alternative argument for the respondents. Accordingly, we would refuse the application.

Salmon J. I have the misfortune to differ from my Lords in the conclusions which they have reached in this case. At the beginning of this year the Barnsley British Co-operative Society Ltd. was minded to extend its business by the sale of spirits at its central drug department in Wellington Street, Barnsley. To this end an application was made on its behalf for a spirits off-licence for those premises. At a meeting of the licensing justices for the county borough of Barnsley held on March 5, 1959, this application was granted. Seven justices sat at this meeting. Six of them were shareholders in, and members of, the society, and thereby admittedly disqualified from acting. The husband of the remaining justice was a shareholder in, and member of, the society. It will thus be seen that there was not even a quorum of qualified justices, as required by section 4 of Part I of the First Schedule to the Licensing Act, 1953. The chairman of the meeting was Alderman A. E. McVie. In July, 1958, he had presented himself for election to the board of directors of the society. There were then two vacancies on the board. Alderman McVie was third amongst the nine unsuccessful candidates. None of the justices disclosed his interest to the present applicants at or before the meeting of March 5, 1959. The application was opposed by the present applicants, the Barnsley and District Licensed Victuallers' Association, and the Barnsley and District Off-Licence Holders' Protection Association. They submitted that there were adequate existing facilities for the sale and purchase of intoxicating liquor in the neighbourhood of the society's central drug department. There were in fact 14 fully licensed or full off-licensed premises within 250 yards (including one of the society's off-licensed premises), and two further full off-licensed premises within 475 yards of these premises. The objectors no doubt pressed their objection because they regarded the society as a particularly serious trade competitor. Intoxicating liquor, in common with everything else in which the society trades, is sold by the society to its members in effect at a discount below ordinary retail list prices. This discount is not deducted at the time of each individual sale but is paid to the member annually on the total amount of his purchases. It is true that the payment is described as a dividend and that the member could not receive it, nor indeed be a member of the society, unless he were a shareholder. The amount of the payment, however, is in no way referable to the size of the member's shareholding; it is calculated solely as a percentage of the member's purchases from the society. It is, in reality, whatever it may be called, a discount. The current rate of discount is 7½ per cent.

The present applicants argue in this court that the decision of the justices should be quashed on the ground of bias. In order for them to succeed it is not necessary for them to go as far as proving actual bias. On the other hand, the authorities plainly establish that it would not be enough for them to show only a bare possibility or a mere suspicion of bias. In order successfully to impugn the decision of the justices, a real likelihood of bias must be established. Quite apart from the common law presumption of bias from any pecuniary interest, with which I will deal presently, how is this onus to be discharged? In my judgment, by establishing that there are real grounds on which ordinary right-thinking people might reasonably conclude that the decision may well have been biased. In such circumstances justice would not manifestly be seen to be done. The doctrine that justice must not only be done but manifestly be seen to be done was enunciated by Lord Hewart C.J. in *Rex* v. *Sussex Justices, ex parte McCarthy*,[7] but its roots are deep in legal history. As this court has pointed out in *Reg.* v. *Camborne Justices, ex parte Pearce*,[8] the doctrine has all too frequently been invoked in attempts to quash convictions or invalidate orders upon the flimsiest pretexts of bias. The fact, however, that the doctrine has sometimes had dubious champions does not in any way detract from its validity or diminish its importance, which is fundamental.

The present applicants now know that the justices by granting the licence obtained the advantage of being able to buy a bottle of gin at about half a crown and a bottle of whisky at about two shillings and nine-pence below the retail list prices at the society's central drug department. It may be argued that the sum involved is small, but to any ordinary mortal the advantage is a very real one. The fact that it can also be enjoyed at the society's other premises 250 yards away does not in my judgment by any means destroy its significance. It is true that it is not certain whether or to what extent any justice is a drinker of spirits; nor could such a matter be inquired into. In my view one may reasonably draw the inference that, at any rate, some of the justices may well drink spirits. There is certainly no reason to assume that they are all teetotallers. Further, the present applicants might reasonably conclude that Alderman McVie's future prospects of election to the society's board of directors would not be enhanced if a justices' meeting, of which he was chairman, refused the society's application for an off-licence. Would any reasonable business man believe that any meeting of which he was chairman could give a completely fair and unbiased hearing to what was, in effect, an application by the society to extend its business in Barnsley? Moreover, the present applicants know that not one or two of the justices, but six out of seven, were members of the society and may reasonably believe that an esprit de corps exists amongst members of the society, not usually to be found amongst shareholders in the ordinary joint stock company. I find it impossible to hold that there are no real grounds on which ordinary right-thinking persons could reasonably conclude that the justices may well have had a bias in favour of granting the licence. If I pose to myself the exact question propounded by Vaughan Williams L.J. in *Rex* v. *Sunderland Justices*,[9] and approved by Lord Atkinson in *Frome United Breweries* v. *Bath Justices*[10]: " Can it be said " here that there was nothing more than a mere possibility or " suspicion that these justices would be biased? We must judge " of this matter as a reasonable man would judge of any matter " in the conduct of his own business. Can one doubt that a " reasonable man as a matter of business would under the circumstances of this case infallibly draw the inference that the " justices . . . would have a real bias in favour of granting the " licence? " I, for my part, am wholly unable to give anything but a negative answer to that question. In the words of Lord Sumner in the *Bath Justices* case,[11] in my view " there existed " in the justices . . . such a likelihood of bias as the parties " interested in (opposing the licence) could not justly be called " upon to risk."

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[7] [1924] 1 K.B. 256; 40 T.L.R. 80.

[8] [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850.

I agree, for the reasons stated by my Lords, that in the circumstances of this case there is no substance in the argument that the present applicants are now precluded from alleging a likelihood of bias because they did not take the point before the justices.

Taking the view that I do, I doubt whether any question arises under section 48 of the Licensing Act, 1953. Subsections (1) to (4) of that section impose certain disqualifications. Subsection (5) provides that no act done by any justice disqualified by the section shall be invalid " by reason only " of that statutory disqualification. As pointed out by this court in *Rex* v. *Tempest*,[12] the proviso to section 60 of the Licensing Act, 1872, which is reproduced in subsection (5), gives no protection in case of bias whether from pecuniary interest or any other cause; it merely avoids the technical disqualifications imposed by the statute; where there is a case of bias it is unnecessary to look at the statute.

There is no doubt that at common law direct pecuniary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. This is no mere technicality but a most salutary rule founded in experience and common sense. As a matter of policy, it is obviously undesirable for any court to embark on the invidious task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal. Any pecuniary interest, however small, is fatal. In such a case the law assumes bias (see *Reg.* v. *Rand*, *per* Blackburn J.[13]; *Rex* v. *Sunderland Justices*, *per* Vaughan Williams L.J.[14]). The justices, as shareholders, had a pecuniary interest, although a very small one, in the subject-matter of the proceeding. It is argued by the present applicants that on that ground alone, and quite apart from the general circumstances with which I have already dealt, the decision should be quashed. On the other hand, the present respondents contend that the combined effect of subsections (4) and (5) of section 48 is to oust the common law presumption of bias, at any rate, in all cases where the licensing justices' pecuniary interest in the subject-matter of the proceeding is very small. I must confess that I would be reluctant to read these subsections as making any such wide inroad into the common law, unless compelled to do so either by authority or by unambiguous language in the subsections themselves. The point in my view is free from direct authority. Neither subsection (5), nor any of the former statutory provisions it reproduces, has ever before been invoked in a case where the justices or any of them had a direct pecuniary interest in the subject-matter of their decision. *Rex* v. *Tempest*[15] in my judgment does not touch this point. In that case one justice was technically disqualified under the Act only because he was a shareholder in a brewery company (present subsection (2)). That company, however, had no connection of any kind with the applicants or opponents to the licence. Nor was it suggested that the proposed licensed premises would compete with the company. The justice, accordingly, had no pecuniary interest in the subject-matter of the inquiry and no question touching the common law rule arose. In *Reg.* v. *Meyer*[16] Blackburn J. points out that the legislature has in many cases removed the disqualification imposed by the common law—see, for example, Justices Jurisdiction Act, 1742, s. 1, Justices of the Peace Act, 1867, s. 2, and the Public Health Act, 1875, s. 258. These and all similar enactments, however, expressly empower the justices to act, for example, in matters relating to rates notwithstanding the fact that the justices have a pecuniary interest in the matter as ratepayers, or expressly remove the disqualification to which a justice would otherwise be subject, for example, as a member of a town council having, as such, a pecuniary interest in the result of a complaint or information. In cases of this type the justices are in a different position from justices who have a pecuniary interest in any matter as shareholders, and no investigation could ever become necessary into the importance of their pecuniary interest as ratepayers or town councillors (*Reg.* v. *Handsley*[17]). Section 48 of the Licensing Act, 1953, is different from all the relevant sections in the class of statutes to which I have referred, in that it is not an empowering section and does not purport to remove any disqualification. Indeed, subsections (1) to (3) impose a number of technical disqualifications going beyond the common law, and subsection (4), far from removing the common law disqualification, expressly disqualifies any justice from acting in any matter in which he is financially interested, and thereby adopts the common law rule. What, then, is the meaning of subsection (5): "No act done by any justice disqualified by this section "shall be invalid by reason only of that disqualification"? In my view the words "that disqualification" refer only to the disqualification under the statute. Since section 48 is not an empowering section or one which removes any disqualification, it leaves the common law disqualification untouched, and this disqualification runs parallel with the statutory disqualification. Accordingly, subsection (5) in my judgment saves any act which would otherwise be invalid by reason only of a disqualification under the statute, but it does not save an act done by a justice disqualified at common law. This view seems to me to derive some support also from Lord Alverstone's judgment in *Rex* v. *Tempest*.[18] It may be asked what purpose could the legislature have had in including subsection (4) in section 48 if it was not intended to absorb the common law disqualification and excuse it under subsection (5). In my view subsection (4) was included because under subsection (6) of section 48 a fine may be imposed on a justice only if he acts for a purpose for which he is disqualified under the statute. Accordingly, unless subsection (4) were included in the section, a justice could be fined for a mere technical disqualification under subsections (1) to (3), but not for the disqualification of pecuniary interest, which would be absurd.

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[9] [1901] 2 K.B. 357, 373.

[10] [1926] A.C. 586, 608; 42 T.L.R. 571.

[11] [1926] A.C. 586, 615.

[12] 86 L.T. 585.

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[13] L.R. 1 Q.B. 230, 232.

[14] [1901] 2 K.B. 357, 371.

[15] 86 L.T. 585.

[16] (1875) 1 Q.B.D. 173.

I have, accordingly, come to the conclusion that the justices' pecuniary interest as shareholders is fatal, and for that reason also this application should succeed. I am fortified in this view by the reflection that if it is correct, the statute will not in any

[17] 8 Q.B.D. 383.

[18] 86 L.T. 585.

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case impose upon the courts the task which, according to the policy of the common law, should never be undertaken by any court, namely, the task of deciding exactly how much pecuniary interest raises a presumption of bias on the part of any particular tribunal.

I would only add that I am not unmindful of the practical difficulties stressed by Mr. McLusky which on the particular facts of this case would be involved in the conclusions I have reached, for all the Barnsley justices (or their near relatives) save one, are members of the society. These difficulties are, however, in my view, of little importance in comparison with the principle involved. In any event the difficulties would undoubtedly exist in any summary proceedings other than licensing matters relating to the society. Such proceedings could not be dealt with by the Barnsley bench as at present constituted, for in such a case an irrebuttable presumption of bias would undoubtedly arise. I would allow the application.

Application refused.
No application for costs.

Solicitors: *Corbin, Greener & Cook for J. Donald Driver, Barnsley; Batchelor, Fry, Coulson & Co. for W. Winter, Barnsley.*

J. D. P.

C. A.

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April 30;
May 1, 6.

Lord Evershed M.R., Ormerod and Willmer L.JJ.

CLIFFORD SABEY (CONTRACTORS) LTD. *v.* LONG AND ANOTHER.

[Plaint No. P. 3283.]

Landlord and Tenant—Rent restriction—Decontrol—New tenancy proposed by landlord—Unreasonable refusal—Political anticipation—Premises decontrolled by Rent Act, 1957*—Landlords' proposal for new tenancy—Proposals refused on ground that law might be amended—Whether tenants' refusal "unreasonable"—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2, *c.* 25), *s.* 11 (1)*—Landlord and Tenant (Temporary Provisions) Act,* 1958 (6 *&* 7 *Eliz.* 2, *c.* 68), *ss.* 1, 3 (1).

The defendants were tenants of a dwelling-house which became decontrolled pursuant to the provisions of section 11 of the Rent Act, 1957, which came into operation on July 6, 1957. On July 10, 1957, the landlords wrote to the tenants determining their right to

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possession on October 6, 1958, and at the same time offering to grant to the tenants a new tenancy from September 29, 1957, for a term of five years at an increased rent, subject to repairing covenants. That offer was open for one month. It was not accepted by the tenants on the ground that they considered that, having regard to the then state of public opinion, there might be further legislation which would improve their position. The tenants having continued in possession, the county court judge, on the application of the landlords, made an order for possession, and he refused to suspend the execution of that order under the Landlord and Tenant (Temporary Provisions) Act, 1958,[1] holding that the landlords' proposals were reasonable, and that in determining whether a tenant had "not "unreasonably refused or failed to accept" a landlord's proposals for the purposes of section 3 (1) of the Act of 1958, the consideration that there might be a change in the law was not a factor which he could take into consideration:—

Held, that in determining the question of reasonableness or unreasonableness in connection with the provisions of section 3 (1) of the Landlord and Tenant (Temporary Provisions) Act, 1958, the relevant date was the date of the tenant's refusal of a landlord's offer rather than the date of the hearing, and that the matter accordingly must be considered as on August 10, 1957 (the latest date when the landlords' offer could be accepted); and that, on the facts of the case, the "political prospects" were irrelevant for the county court judge's consideration.

Dictum of Lord Greene M.R. in *Cumming* v. *Danson* (1942) 112 L.J.K.B. 145, 147; 59 T.L.R. 70; [1942] 2 All E.R. 653 applied.

Semble, that there might be circumstances in which "political

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[1] Landlord and Tenant (Temporary Provisions) Act, 1958, s. 1: "(1) It shall not be lawful for the "owner of a dwelling-house to which "this Act applies—(*a*) to enforce "against the occupier, otherwise than "by proceedings in a court of competent jurisdiction, the right to "recover possession of the dwelling-"house . . . (2) Subject to subsection "(3) of this section, this Act applies "to any dwelling-house to which the "Rent Act ceased to apply by virtue "of subsection (1) of section 11 of "the Rent Act, 1957, being a "dwelling-house in the case of which "[certain conditions are satisfied] ". . ."

S. 3: "(1) Without prejudice to "the power of any court . . . to post-"pone the operation or suspend the "execution of an order for possession, "if in proceedings by the owner "against the occupier for the recovery "of possession of a dwelling-house to "which this Act applies the occupier "satisfies the court—(*a*) that he has "not unreasonably refused or failed "to accept any proposal made by the "owner for the grant of a new "tenancy of the premises . . . being a "tenancy for a term of not less than "three years . . . then . . . the court "shall suspend the execution of any "order for possession. . . . (3) In "considering whether any of the con-"ditions specified in paragraph (*a*) or "paragraph (*b*) of subsection (1) of "this section are fulfilled, regard shall "be had, among other things, to the "means of the occupier, to his age, "and to any disability to which he "may be subject, and (without preju-"dice to the generality of the foregoing "provision) in considering whether a "refusal or failure to accept any such "proposal as is referred to in the said "paragraph (*a*) was reasonable, regard "shall be had in particular to the "terms of that proposal relating to "repairs, improvements or mainten-"ance."

"prospects" would be relevant for consideration in determining whether a tenant's refusal was unreasonable: if it were proved that at the relevant date amending legislation was pending or even probable, which legislation would be likely to affect later agreements containing terms such as those in the agreement preferred by the landlord, it might be that a court would, for that reason, hold it was not unreasonable for a tenant to decline to bind himself and to play for time. It was not relevant for the court to take into consideration the mere possibility of some change of legislation in the near or foreseeable future.

APPEAL from Judge Leon sitting at Willesden County Court.

The defendants Mr. and Mrs. Long were the tenants of 233, Carlton Avenue, Wembley, under an agreement of June 20, 1940. The premises became decontrolled on July 6, 1957, under the Rent Act, 1957. By letter of July 10, 1957, the plaintiffs, Clifford Sabey (Contractors) Ltd., as landlords, served notice on the tenants to give up possession on October 6, 1958, the earliest date on which possession could be claimed under the Act of 1957. At the same time the landlords offered to the tenants a new tenancy for a term of five years from September 29, 1957, at a rent of £150, subject to certain repairing obligations. That offer, which was open for one month, was not accepted by the tenants. The principal ground for their failure to accept was that the tenants considered that there might be amending legislation which would improve their position. On April 16, 1958, the Landlord and Tenant (Temporary Provisions) Bill was presented to the House of Commons to give effect to the Government's intentions, first announced on April 2, to amend the Act of 1957. The Landlord and Tenant (Temporary Provisions) Act, 1958, was passed and came into force on August 1, 1958.

The tenants having failed to give up possession, the landlords in these proceedings sought to recover possession. The tenants asked the court to postpone making an order for possession under the power conferred by section 1 of the Landlord and Tenant (Temporary Provisions) Act, 1958.

The county court judge, after holding that the landlords' proposal was reasonable, made an order for possession, holding further that he was not entitled to take into consideration the political situation in determining whether the tenants' refusal was unreasonable so as to entitle him to suspend the execution of his order for possession under section 3 (1) of the Act of 1958. His judgment is fully stated in that of Lord Evershed M.R.

The tenants appealed.

Bernard Marder (*Miss Bisschop* with him) for the tenants. The tenants are asking for the suspension, pursuant to section 3 (1) of the Landlord and Tenant (Temporary Provisions) Act, 1958, of the order for possession which has been made against them. It is necessary for the tenants to establish that they have "not "unreasonably" refused to accept proposals made by their landlords. Under the Rent Act, 1957, s. 11 (1), the tenants' premises became decontrolled but they could not be evicted for 15 months. The effect of the Act of 1958 is to enable the court to stagger evictions by postponing the landlord's right to possession. The intention of the Act of 1958 appears from its preamble. The onus of proof is placed by the Act of 1958 on the tenant. He has to establish a case for postponing the landlord's right to possession. These tenants accept that the judge was entitled to say in this case that the landlords' offer was reasonable. It is, however, submitted that the judge was wrong in saying that it was unreasonable to refuse the offer on the ground of the amount of the rent. The test whether the rent was reasonable and within the tenants' means was too narrow. There was no evidence on which the judge could hold that the rent was reasonable. The landlords called no such evidence. Then as to the repairing liability; the judge held that the tenants' refusal was unreasonable, since no objection had been taken in the course of the negotiations to this term. If an offer made by a landlord is in itself reasonable, a tenant's refusal to accept it may nevertheless be reasonable. For example, a tenant may know that the probabilities are that he will find another house in six months. In such a case he would be reasonable in not accepting the offer of a lease for three years.

The main objection to the decision is that the judge held that he was precluded as a matter of law from taking into consideration the fact that the law might be altered. A possible change in the law is a matter of fact. The question is whether the judge took into consideration all those matters which a reasonable man would take into account. It is not true to say that every tenant could get relief if he said he had refused the offer of a new tenancy because he thought the law would be changed. He would not get relief, for example: (i) if he were not believed; (ii) if he had not in fact given any thought to a possible change in the law; or (iii) if he had been offered a new tenancy after the Act of 1958 came into operation. The question is whether it was reasonable for the tenants to expect a change in the law. There is nothing which precludes a judge from taking that matter into account. There is nothing in section 3 of the Act of 1958 which limits the matters a judge may take into account in deciding whether a tenant has "unreasonably refused" his landlord's offer. The tenants here acted reasonably.

Derek Wheatley for the landlords. The burden of proving that they were not "unreasonable" rests on the tenants. The only real point in this case is the political point. In the circumstances, as they were when these tenants refused the offer of their landlords, the judge was right in refusing to assess the prospects by a possible change in the law in August, 1957. The evidence required to prove the political prospects at that date would be enormous. Subsection (3) of section 3 is intended to give some guidance as to the factors which the court should take into account. Those factors relate either to the terms of the landlord's proposals or to the circumstances, financial or otherwise, of the tenant. Political factors are extraneous matters which should not be taken into account. The tenants have not discharged the onus which is on them.

Marder in reply. The judge should have taken the political factor into account. It was for the judge to decide whether the tenants had in all the circumstances acted as a reasonable man would have acted.

Cur. adv. vult.

May 6. Lord Evershed M.R. read the following judgment. The appellants in this case have been for many years tenants of premises known as 233, Carlton Avenue, Wembley, being premises which were subject to the Rent Restriction legislation. The question which has arisen is whether they should now obtain under section 3 of the Landlord and Tenant (Temporary Provisions) Act, 1958, a suspension of the right of the plaintiffs, their landlords, to an order for possession to which otherwise the landlords are entitled by virtue of the Rent Act, 1957.

On July 10, 1957, which was very shortly after the Rent Act, 1957, had come into operation and decontrolled these premises, the landlords made an offer in writing, by letter, for the grant of a new lease from September 29 then following of the premises for a period of five years at a rent of £150 per annum, exclusive of rates, and on terms that there should be a full repairing covenant on the part of the lessees.

The sole question is whether the tenants, the appellants here, were justified in not accepting that offer within the period of one month given by the letter in which the offer was made.

Section 11 (1) of the Rent Act, 1957, which is the provision which "decontrolled"—for that is the word generally used—these premises provides: "The Rent Acts shall not apply to "any dwelling-house the rateable value of which on the 7th day "of November, 1956," exceeded a certain figure, and that applied to these premises. Subsection (7) of the same section made applicable the transitional provisions stated in the Fourth Schedule to the Act. I need not refer in detail to these provisions but the effect is this: The Act came into operation one month from the date of the Royal Assent being given to it, namely, on July 6, 1957. By virtue of these provisions, one in the position of the tenants was entitled (provided, of course, he complied with obligations as to paying rent and performance of covenants and so on) to remain in possession until October 6, 1958. But the transitional provisions also contained a further clause to the effect that the landlord in such a case could make an offer of the grant of a new lease for not less than three years at a rent which would not include a premium, and, if that offer were accepted, then the tenants would thenceforth hold under the terms of the lease offered, and the other provisions of the Fourth Schedule would then be suspended. But it will be observed that the terms of section 11 (1) did contemplate in law that, when the proper time came, a landlord might eject a tenant whose premises had become decontrolled, without having to go to the court for an order, a proceeding well established by the common law in matters of this kind. The Landlord and Tenant (Temporary Provisions) Act, 1958, somewhat assisted tenants, like the present tenants, whose premises had been decontrolled by the Act of 1957. By section 1 of the Act of 1958 it was enacted that a landlord could not get possession against an unwilling tenant save by order of the court.

For present purposes, the important section is section 3, which, in certain circumstances, suspended the execution of an order for possession. Subsection (1) provides: "Without pre-"judice to the power of any court apart from this section to "postpone the operation or suspend the execution of an order "for possession, if in proceedings by the owner against the "occupier for the recovery of possession of a dwelling-house to "which this Act applies the occupier satisfies the court—(*a*) that "he has not unreasonably refused or failed to accept any pro-"posal made by the owner for the grant of a new tenancy of "the premises or part of the premises, being a tenancy for a "term of not less than three years and not being a tenancy "to be granted at a premium or requiring the payment of "increased rent in respect of any period before the date on which "the proposal was made."

Then there follow three other paragraphs referring to conditions which the occupier must also satisfy, but which raise no question for the present purpose. The subsection proceeds: ". . . then, subject to the provisions of this section, the court "shall suspend the execution of any order for possession made "in the proceedings for such period, not being less than three "nor more than nine months from the date of the order, as the "court thinks fit."

Subsection (3) is in these terms: "In considering whether "any of the conditions specified in paragraph (*a*) or paragraph "(*b*) of subsection (1) of this section are fulfilled, regard shall be "had, among other things, to the means of the occupier, to his "age, and to any disability to which he may be subject, and "(without prejudice to the generality of the foregoing provision) "in considering whether a refusal or failure to accept any such "proposal as is referred to in the said paragraph (*a*) was reasonable, regard shall be had in particular to the terms of that "proposal relating to repairs, improvements or maintenance."

Two grounds were suggested for the view put forward by the tenants that they had not unreasonably failed or refused to accept the offer of July 10, 1957, and had fully satisfied paragraph (*a*). The first was because of the figure inserted in the offer for rent and perhaps also because of the suggested full repairing covenants. This ground was rejected by the county court judge and was but faintly argued before us. I am satisfied that there is no substance in this point and that the judge was entitled to hold, as he did, that the terms as to rent and repairs were reasonable and that, in the circumstances, including means and age and so forth, the tenants do not show a case on this ground under paragraph (*a*).

I pass, therefore, to the second ground put forward by the tenants. It was said that because of current public feeling—that is, current at the time of the offer being made—and criticism of the Government's policy on the Rent Acts, which the tenants thought might result in some change in the legislation, they were entitled to play for time. This ground was stated by the judge (and it is not suggested that it was wrongly stated) thus: "He" —that is the first defendant—"felt that owing to the considerable agitation which the passing of the Rent Act, 1957, had "produced politically and publicly, there was a good chance that "the law would be altered in his favour and he wanted to wait "to see if it would be before he accepted the offer." On this ground, the argument was substantially confined before us, and, we thought, having regard to the novelty of the point and the nature of the legislation, we should put our conclusions into writing.

The judge's view upon it is as follows: "With regard to the "second ground, I appreciated that in one sense it may be "reasonable for a person to consider the political situation and "whether there is going to be a General Election, whether the "Government is likely to introduce fresh legislation and kindred "matters before coming to a conclusion as to a particular course "of conduct. Business men do this regularly and no-one can "say that they are unreasonable in so doing. The Act of 1957 "was new at the time of the landlord's offer, and counsel for the "tenant pressed on me the submission that it must have been "reasonable for the tenant, in view of the strong political re- "action which the passing of the Act of 1957 has provoked, to "consider whether this would have any effect before accepting "the landlord's offer. He urged on me too in support of this "argument that the passing of the Act of 1958 did mitigate the "law from tenants' point of view and that in consequence it "must have been reasonable for the tenant to wait to see if "such legislation took place. I held that in spite of the above "considerations the expression 'not unreasonably' in the Act of "1958 did not entitle the tenant to consider the political situa- "tion, the possibility of further legislation and such matters. "I said that the only matters the tenant was entitled to consider "were (1) the nature of the offer itself, i.e., the rent and other "terms and the fair value of the tenancy and the like, (2) his "own means and his situation generally present and future in- "cluding, of course, that of his family and similar matters. If "every tenant were entitled to say he refused an offer because "he thought there might be a General Election or further legis- "lation such an argument might successfully be raised by almost "every tenant who had refused an offer. I did not consider that "the fact that the Act of 1957 was new at the time of the "landlord's offer made any difference. Either the argument was "valid or it was not, and, having regard to the object of the "Act of 1958 and the matters with which it was dealing, I "held that it was not. I held that the tenant did in fact have "in mind the possibility of further legislation when he rejected "the offer and if I was entitled to take that into consideration "in considering whether he acted unreasonably or not I should "have suspended execution of the order for the six months. "Holding as I did that that was not a matter I was entitled to "take into consideration I held that the tenant had been unreasonable in refusing the offer and dismissed his application "under the Act of 1958."

Mr. Marder's argument for the tenants was that the question of reasonableness or unreasonableness is one of fact throughout, and that the political prospects in July and August, 1957, whatever their weight, character or effect, were facts at that date and should not have been wholly excluded from consideration. In other words, he contended that the judge was wrong in saying as a matter of law that these political prospects were irrelevant for his consideration, and he drew attention particularly to the statement at the end of the judgment that "I should, if I could "have taken them into account, have suspended the execution "of the order for six months."

I venture to make two preliminary observations. First, in considering the question of reasonableness or unreasonableness in connection with this legislation, I cite, as I have many times done before, the language used by my predecessor, Lord Greene M.R. in *Cumming* v. *Danson*[1]: ". . . the duty of the judge is to "take into account all relevant circumstances as they existed at "the date of the hearing. That he must do in what I venture to "call a broad, common sense way as a man of the world, and come "to his conclusion, giving such weight as he thinks right to the "various factors of the situation. Some factors may have little or "no weight, others may be decisive." In the present case, the relevant date is the date of the refusal rather than the date of the hearing, but the words I emphasise are: "That he must do "in . . . a broad, common sense way as a man of the world," etc. The conclusion must be arrived at as on August 10, 1957, the latest date when the offer could have been accepted.

Secondly, I observe that (apart from the introduction to the requirements by section 1 of the Act of 1958 that an order for possession must be obtained, which is not, I think, of significance for present purposes) the law as it appeared in the Act of 1957, and so far as is relevant for present purposes, has not changed at all in fact. The tenants in August, 1957, had a choice of two alternatives—to remain on till October 6, 1958, under the existing statutory tenancy, or to accept the offer made for a five-year tenancy from September 29, 1957, at the rent and on the terms suggested. The character and incidents of neither of those alternatives have since been changed by the subsequent legislation.

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[1] (1942) 112 L.J.K.B. 145, 147; 59 T.L.R. 70; [1942] 2 All E.R. 653.

Applying, therefore, what I conceive to be the proper test in saying whether a tenant's refusal is unreasonable, I should not wish to lay it down, nor is it necessary to do so, that no circumstances existing at the relevant time which could properly be comprehended by the formula which I have for convenience used, namely, "political prospects," would be relevant for consideration. If it were proved that at the relevant date amending legislation were pending or even probable, which legislation would be likely to affect later agreements containing terms such as those in the proffered agreement, it may be that a court would, for that reason, hold it not unreasonable for a tenant to decline to bind himself and to play for time. But those are not the facts in the present case. At most, on the evidence, there was some political agitation. As the judge said: "What the tenants really wanted "was much longer time to see if the Government yielded to "pressure and passed legislation to ameliorate the position from "tenants' point of view."

On the facts of the present case I agree with the judge that these "political prospects" were irrelevant for his consideration. I agree with him that it is not relevant for the court to take into account the mere possibility of some change of legislation in the near or foreseeable future—a possibility which is at all times present.

I further agree with Mr. Wheatley that, if the answer were otherwise, the inquiry involved, if not impossible, would be foreign to the normal judicial function, since the court would have to inquire into and form its own estimate upon the political temper and pressures of the day. I add, too, that the question in any case is not whether the tenants' hopes and wishes were reasonable, but whether, judged objectively, they unreasonably refused the offer which the landlords made.

Mr. Wheatley also invoked the terms of section 3 (3). He said that, without seeking to restrict the guidance indicated by the subsection to the instances which it contained, the subsection plainly inferred that the circumstances relevant for consideration fall broadly under two heads, namely, (1) those personal to the tenant, his finances, health, age and so on; and (2) those related to the terms of the landlord's offer, but particularly in regard to repairs; and that "political prospects" of the kind present in this case were far removed from either head.

For reasons already given, it might be otherwise if it were

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proved that amending legislation was actually in prospect, which would affect, for instance, the terms of the landlords' offer relating to repairs, etc.; but, subject to this proviso, and without attempting any further exposition of the intent and effect of subsection (3), I think its terms lend support to the view I have expressed. I would therefore dismiss the appeal.

I should add that Ormerod L.J. has authorised me to say that he agrees with the judgment which I have delivered.

Willmer L.J. I also agree and have nothing to add to what my Lord has said.

Appeal dismissed, with costs.

Solicitors: *Seifert, Sedley & Co.; Curwen, Carter & Evans.*

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May 1, 8.

Lord Goddard, Romer and Pearce L.JJ.

WALSH *v.* ALLWEATHER MECHANICAL GROUTING CO. LTD.

[1955 W. No. 1749.]

Factory—Definition—Temporary use of part for repairs—Apron of airfield in vicinity of hangar—Hangar a factory—Apron enclosed by security fence—Repairs being carried out to apron—Whether apron premises within "close or curtilage, or precincts" of factory—Whether apron "place situate within the close, curtilage, or "precincts forming a factory . . . used for some purpose other than "the processes carried on in the factory"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 151 (1) (6)—*Protection of Eyes Regulations,* 1938 (*S.R. & O.*, 1938, *No.* 654).

The plaintiff was a ganger in charge of a group of men engaged on breaking up and re-laying an area of concrete on the eastern apron of an airfield in the vicinity of a hangar used for testing and assembling aircraft. The defendants, who were the employers of the workmen, had contracted with the Air Ministry to do the work. The eastern apron was bounded by a security fence put up to prevent unauthorised spectators seeing what happened when 'planes were tested on the apron. As the plaintiff passed one of the workmen who was using a pneumatic drill a fragment of flying concrete injured his eye. In his action for damages against the

[Reported by Norman Primost, Esq., Barrister-at-Law.]

defendants for, inter alia, breach of the Protection of Eyes Regulations, 1938, in that they failed to supply him with goggles, it was conceded that the hangar was a factory for the purposes of the Factories Act, 1937 [1]:—

Held, (1) that the eastern apron was within the close, curtilage or precincts of the hangar, being a space enclosed by the security fence, but

(2) that the replacement of the apron, not being an incident of the processes of aeroplane assembly and testing, was not something which was incidental to the processes carried on in the factory; but it was "a place . . . solely used for some purpose other than the "processes carried on in the factory" within section 151 (6) of the Act of 1937, and therefore was excluded from the operation of the Act. Accordingly, the plaintiff was not within the Protection of Eyes Regulations, 1938, and his claim under them failed.

Cox v. *Cutler & Sons Ltd.* [1948] W.N. 345; [1948] 2 All E.R. 665; approved in *Street* v. *British Electricity Authority* [1952] 2 Q.B. 399; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679 applied.

Thurogood v. *Van Den Berghs and Jurgens Ltd.* [1951] 2 K.B. 537; [1951] 1 T.L.R. 577; sub nom. *Thorogood* v. *Van Den Berghs and Jurgens Ltd.* [1951] 1 All E.R. 682 distinguished.

Decision of Glyn-Jones J. affirmed, but on a different ground.

APPEAL from Glyn-Jones J.

The defendants had contracted with the Air Ministry to resurface a large area of concrete at Northolt airfield. The plaintiff, an employee of the defendants, was a ganger in charge of a group of men breaking up and relaying concrete; the concrete was broken up and relaid in certain pre-arranged areas, but so that there was always an avenue of access to the hangars. The plaintiff had to supervise the spreading of the concrete and on the day of the accident, March 10, 1954, he was walking towards a lorry to direct the driver where to leave the concrete in the lorry when he passed a man using a load breaker, which threw up a piece of concrete injuring his right eye, resulting, ultimately, in its loss of sight.

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[1] Factories Act, 1937, s. 151: "(1) Subject to the provisions of this "section, the expression 'factory' "means any premises in which, or "within the close or curtilage or "precincts of which, persons are "employed in manual labour in any "process for or incidental to any of "the following purposes, . . . being "premises in which, or within the "close or curtilage or precincts of "which, the work is carried on by "way of trade or for purposes of gain "and to or over which the employer "of the persons employed therein "has the right of access or control. ". . . (6) Where a place situate "within the close, curtilage, or precincts forming a factory is solely "used for some purpose other than "the processes carried on in the "factory, that place shall not be "deemed to form part of the factory "for the purposes of this Act, but "shall, if otherwise it would be a "factory, be deemed to be a separate "factory."

The accident occurred on the eastern apron in the vicinity of hangar No. 6. The apron was bounded by a removable fence of chestnut palings put up as a security fence to prevent unauthorised persons from seeing what happened when 'planes were tested on the apron. Hangar No. 6 was in the occupation of the Fairey Aviation Co. Ltd., under licence from the Air Ministry; the annual licence fees were £4,900 and these fees included the occupation of the eastern apron within the security fence. It was a term of the licence that if any continued use was made of the western apron, additional charges would be payable by the licensee, and, that if the security fence necessitated the construction of a new road or pathway round it, the cost would be borne by the licensee.

The plaintiff brought an action against the defendants, claiming damages for the injuries he suffered because of the accident. He relied, inter alia, on the defendants' failure to supply him with goggles pursuant to the Protection of Eyes Regulations, 1938, made under section 49 of the Factories Act, 1937. The trial judge held that the eastern apron was not within the close, curtilage or precincts of the hangar and, therefore, was not a factory within the Factories Act, 1937. Accordingly, the regulations of 1938 did not apply, and he dismissed the plaintiff's claim.

The plaintiff appealed.

John Platts-Mills for the plaintiff. By section 139 of the Factories Act, 1937, independent contractors, who have hired a road-breaking machine, are treated as occupiers of the factory as regards the men working on the machine. Road breaking and surfacing is a process to which the Protection of Eyes Regulations, 1938, apply, and those regulations require that goggles be provided to every person engaged in the process of breaking concrete. If, therefore, the apron where the plaintiff was working was part of a factory the defendants were in breach of a statutory duty and are liable to him in damages. The defendants conceded that the hangar was a factory. The eastern apron or forecourt of the hangar is, it is submitted, premises "within the close or curtilage or "precincts of" the hangar and satisfies the definition of factory in section 151 (1) of the Act of 1937. The test whether an area is within the curtilage or precincts depends solely on geographical considerations. The concrete apron, being a close enclosed by a fence, is within the curtilage. The forecourt resembles a courtyard—which is the typical case of a curtilage. Curtilage in its

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original meaning meant a court. Close is a derivative from the Latin word, clausum, and means something marked by boundaries so that it can be broken. A close must be bounded by a fence. "Precinct" derives from a Latin word which means to girdle around. It connotes the idea of an enclosed area. Close, curtilage and precincts must have notional boundaries, and be demarcated in some way by a defined point. The boundary in the present case is the fence.

Back v. *Dick Kerr & Co. Ltd.*[2] shows that geographical considerations determine what is an area for the purposes of the Factories Acts and related legislation: see *per* Lord Davey [3] and Lord Atkinson [4] citing *Wrigley* v. *Whittaker.*[5] The Act of 1937 has equated the independent contractor with the occupier of the factory. In *Whalley* v. *Briggs Motor Bodies Ltd.*[6] a workman injured in a factory was employed by an independent contractor. He sued the owner of the factory building, but it was held that he should have sued his employer.

Apart from physical and geographical considerations, the apron should be treated as part of the hangar or factory because of the use to which it was put. It was being used for testing also planes and that made it an essential part or incident of the hangar. In *Acton Corporation* v. *West Middlesex Assessment Committee* [7] the issue was whether a particular site used for testing propellers, which were manufactured elsewhere, was an "industrial hereditament" for rating purposes. It was held that since the testing was incidental to the manufacture of the propellers, the site was an "industrial hereditament." [Reference was also made to *Lewis* v. *Gilbertson & Co. Ltd.*[8]]

Martin Jukes Q.C. and *Bernard Caulfield* for the defendants. It is a misnomer to call the apron a forecourt. The apron was the way or mode of access from the perimeter track to the hangar. The fact that it is surrounded by a fence is immaterial. A road is not the less a road nor does it become part of a factory merely by putting a fence around it. If this apron is within the precincts, the remainder of the runway would also be within the precincts. The apron was merely a part of continuous stretches of concrete which formed the airfield. The facility of using the apron was granted under licence and amounted in effect to a right of way.

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[2] [1906] A.C. 325; 22 T.L.R. 548.

[3] [1906] A.C. 325, 329.

[4] Ibid. 333.

[5] [1902] A.C. 299.

[6] [1954] 1 W.L.R. 840; [1954] 2 All E.R. 193.

[7] [1949] 2 K.B. 10; 65 T.L.R. 168; [1949] 1 All E.R. 409.

[8] (1904) 68 J.P. 323; 91 L.T. 377.

But an access is not a part of the area through which it extends unless possibly an exclusive right of access is granted. But this licence did not grant exclusive occupation. Physically the apron is quite distinct from the hangar; whether it is part of the hangar is essentially a question of fact. However the matter is viewed, a right of way or a right of access is not a part of the factory.

It is difficult to define "precincts" with precision, but it cannot embrace a bare right of access from one area to another. "Curtilage" was discussed in *Brass* v. *L.C.C.*,[9] which shows that both the "close" and "curtilage" of a factory should be narrowly construed. It was said there that where there were two floors on the same building with different means of access, neither was within the close or curtilage of the other: see *per* Lord Alverstone C.J.,[10] *per* Wills J.[11] and *per* Kennedy J.[12] [Reference was also made to *Taylor* v. *Hickes*.[13]]

If the eastern apron is regarded as part of the hangar, so that it is part of a factory, the defendants rely on section 151 (6). Even if the apron be within the precincts of the hangar, it was being used for purposes entirely separate and distinct from the manufacturing process, and therefore it is a place deemed by the subsection not to form part of the factory. In *Cox* v. *Cutler & Sons Ltd.*[14] contractors were employed on the reconstruction of the western site of a gas undertaking. The western site had been completely destroyed. A steel erector employed by the contractors was injured. It was held that the area on which he was employed, being used for a process distinct from the manufacturing process, was deemed by section 151 (6) not to be part of a factory, and therefore he was not protected by the Factories Act, 1937. Notwithstanding what was said in *Lewis* v. *Gilbertson & Co. Ltd.*,[15] the Court of Appeal in *Cox's* case [16] held that any area within a factory could still not be part of the factory if it was being used for an entirely separate and distinct purpose. The part of the apron being repaired had nothing to do with the repair or maintenance of aircraft. *Cox* v. *Cutler & Sons Ltd.*[17] was approved in *Street* v. *British Electricity Authority*.[18] There a part of a generating station was under construction. It was held that the Factories Act, 1937, did not apply, because that particular part was a place used for a purpose other than for generating electricity.

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[9] [1904] 2 K.B. 336; 20 T.L.R. 464.

[10] [1904] 2 K.B. 336, 340.

[11] Ibid. 341.

[12] Ibid.

[13] (1861) 12 C.B.N.S. 152.

[14] [1948] 2 All E.R. 665.

[15] 68 J.P. 323.

[16] [1948] 2 All E.R. 665.

[17] Ibid.

[18] [1952] 2 Q.B. 399, 410; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.

In the present case, the plaintiff was not engaged on work that had any connection with aircraft. If that be right, he is outside the protection of the Act of 1937.

Platts-Mills in reply. The cases relied on by the defendants are distinguishable: *Cox* v. *Cutler & Sons Ltd.*[19] concerned the construction of a new gasholder; *Street* v. *British Electricity Authority*[20] was a case where a factory never existed to repair. They were not cases of the repair of a factory as a going concern. Repair is a matter incidental to the running of a factory; rebuilding or construction is not. The present case is one of repair and falls within the principle of *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*[21] In that case an electric fan in a margarine factory was taken to a separate site in the curtilage of the main building and there repaired. A workman was injured while repairing the fan and it was held that he was within the Factories Act, 1937, because he was engaged in a process incidental to the main manufacturing process. The repair of the fan was a necessary incident of the running of the factory. Similarly, the renewal of the apron was a necessary incident to the running of the hangar.

In any case, a "place" within section 151 (6) must be something which is clearly defined and demarcated. See, as to the meaning of "place" under the Betting Act, 1853, *Powell* v. *Kempton Park Racecourse Co. Ltd.*[22] Unless there is such a clearly delimited place, section 151 (6) cannot begin to apply so as to protect the defendants. The work in the present case was done in strips so as not to interfere with access to and from the hangar. The defendants were never at any given time allotted a particular place on which to work. They were working on an area in piecemeal fashion; but the particular part on which they actually worked could never be clearly defined.

Cur. adv. vult.

ROMER L.J. The judgment which Pearce L.J. is about to read is the judgment of the court.

PEARCE L.J. stated the facts and continued: The appeal turns on whether the place where the accident happened was a "factory" within the meaning of the Factories Act, 1937. The plaintiff's argument runs thus. Section 151 (1) of the Factories

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[19] [1948] 2 All E.R. 665.

[20] [1952] 2 Q.B. 399.

[21] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; sub nom. *Thorogood* v. *Van Den Berghs and Jurgens Ltd.* [1951] 1 All E.R. 682.

[22] [1906] A.C. 325.

Act, 1937, defines a factory as follows: "Subject to the provisions of this section, the expression 'factory' means any "premises in which, or within the close or curtilage or precincts "of which, persons are employed in manual labour in any "process for or incidental to any of the following purposes, "namely:—(*a*) the making of any article or of part of any article; "or (*b*) the altering, repairing, ornamenting, finishing, cleaning, "or washing, or the breaking up or demolition of any article; or "(*c*) the adapting for sale of any article; being premises in which, "or within the close or curtilage or precincts of which, the work "is carried on by way of trade or for purposes of gain and to or "over which the employer of the persons employed therein has "the right of access or control." Hangar No. 6 was admittedly a factory. The work was being done by the defendants on the apron of hangar No. 6. The judge, it is said, should have found that this apron was within "the close, curtilage or precincts" of hangar No. 6 and was therefore part of the factory.

Section 139 provides that: "Where in a factory the owner or "hirer of a machine or implement moved by mechanical power "is some person other than the occupier of the factory, the "owner or hirer shall, so far as respects any offence under this "Act committed in relation to a person who is employed in or "about or in connection with that machine or implement, and "is in the employment or pay of the owner or hirer, be deemed "to be the occupier of the factory." The result of that section is that a man who hires out his machine and his employee to be used in a factory is put in the same position as if he himself occupied the factory in which his machine and employee work. Presumably the section was inserted to prevent the evasion of duties under the Act of 1937 by the employment in factories of machines and men hired from independent contractors, who would not apart from this section be bound by the provisions of the Act.

If the place where the accident occurred was part of a factory, the defendants are deemed to be occupiers of it and all the duties imposed by the Act have to be complied with. Admittedly, if the Act is applicable in this case, it produces an anomalous and artificial result. For, when the bulk of the work is being done on the rest of the airfield, the precautions imposed by the Factories Act are not necessary; but, when a small part of precisely similar work comes within a certain distance of hangar No. 6, those precautions have to be observed.

Among the duties laid down by the Act, section 49 provides:

"In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process." The Protection of Eyes Regulations, 1938, apply section 49 to certain scheduled processes, one of which is "Breaking or dressing of stone concrete or slag." Therefore if the place of the accident was part of a factory it seems clear that the Protection of Eyes Regulations apply section 49 to the work that was being done by the defendants at that place.

The defendants, however, contend that the place of the accident was not within the close, curtilage or precincts of the factory. Alternatively, they argue that the provisions of section 151 (6) apply to the circumstances of this case and thereby the place is deemed not to form part of the factory, although it would otherwise do so. [His Lordship read section 151 (6) and continued:] The place of the accident would clearly not otherwise be a factory and was not a separate factory.

The defendants further argue that the plaintiff was not within section 49 since he was not employed in the process of breaking concrete but was a ganger supervising an operation, part of which was the process of breaking concrete. On the view that we have formed it is not necessary to decide that question. The first question is whether the place of the accident was within the close, curtilage or precincts of hangar No. 6.

The defendants contend that the apron was merely a part of the continuous and vast stretches of concrete that ran around and about the airfield. It had, of course, to be used by the company to bring their aeroplanes into and out of the hangar, but they had no exclusive occupation and their licence to use it was, they argue, in the nature of a right of way. The portion of concrete that adjoined the hangar did not, it is said, by mere proximity or by the fact that aircraft were taken there for testing become part of the close, curtilage or precincts of the hangar. These contentions were accepted by the judge. While we appreciate the force of the arguments which weighed with him, we feel unable to come to the same conclusion, for the following reasons.

The annual payment of licence fees according to the licence includes the use of "the apron now within the security fence," and if the western apron is used there are to be extra charges. The company are therefore receiving and paying for special rights of use in respect of "the apron now within the security fence." The company were clearly intended to have a right of way to and fro over so much of the main area of concrete as was necessary to bring material to the factory, but they have a specified right to the apron over and above any right of way. That apron is regarded as something separate and apart from the main run of concrete further from the hangar and its use is expressly mentioned as included in the annual payment. The security fence is set there to give the company privacy from unauthorised persons. Moreover, the security fence, though on occasion removable, is regarded as of sufficient importance and permanence to justify the insertion of a term that the company must pay for the construction of any new road round it, if that were made necessary by the existence of the fence. It is true that the form of the company's occupation is described as a licence, and no doubt the Air Ministry always reserve to themselves full rights as an owner who has granted a mere licence. But the normal meaning and common sense of the agreement seems to us to be that the company are to use and enjoy the privacy of the apron for their own purposes of testing with a right to exclude unauthorised persons.

Neither side relied on any dictionary for the meaning of the words "close," "curtilage" or "precincts," or on any case defining those words with precision. It was conceded that the words "close" and "precincts" import the notion of a boundary surrounding an enclosure, but that the boundary might be a line or notional surround. The first meaning of "precinct" given in the Shorter Oxford Dictionary is: "The "space enclosed by the walls or other boundaries of a particular "place or building or by an imaginary line drawn around it, "especially the ground immediately surrounding a religious "house or place of worship." The word can also be used to mean "the environs." With all respect to the judge's contrary opinion, we think that this apron was within the close, curtilage or precincts of the hangar and that the position of the fence at the time when the licence was given (whether thereafter it was in situ or temporarily removed) must be regarded as the limit of the close, curtilage or precinct.

One must next consider whether the place in question, although it would otherwise be within the precincts of a factory, is by virtue of section 151 (6) deemed not to form part of the factory.

In order to satisfy the requirements of section 151 (6) the place where the concrete was being broken must be shown to be "a place solely used for some purpose other than the processes "used in the factory." That question must be largely a question of fact and degree. The judge did not make any finding on it, since on the view that he took it was unnecessary. It was therefore contended by the plaintiff that there should be a new trial on this issue. But in our opinion a new trial is unnecessary since the facts on which the point has to be decided sufficiently emerge and are not really in dispute.

The facts are these. In order not to interfere with access to and from the hangar the work was done in pre-arranged strips. The aeroplanes obviously could not move in or out over a part where the concrete was being broken or a part where it was being relaid. The whole of the east end of the hangar could be opened by sliding doors. There was a central girder with two sliding doors on each side of it. The defendants worked on areas that left a lane of access to and from each half of the hangar: that is to say, opposite each half of the whole eastern side of the hangar there would be a strip that was being interfered with by the defendants' work opposite one sliding door and a strip that was fit to carry aircraft opposite the other sliding door. Thus the place where the concrete was being broken by the defendants was being used solely for some purpose other than assembling or testing aircraft. For no aircraft could go on to it for any purpose.

But Mr. Platts-Mills contends that the words "the processes "carried on in the factory" include the incidental and necessary processes of repairing machinery and that they also include the repair of the apron as incidental to the processes. He relies on *Thurogood* v. *Van Den Berghs and Jurgens Ltd.*,[1] a case in this court, where it was held that a place to which machines in a factory were taken for repair and testing was not "used for some "purpose other than the processes used in the factory." But that case is no guide in the matter before us. The testing and repair of machines is a normal incident of factory life, and a repairs department of a factory is one of its ordinary adjuncts.

On the other side, Mr. Jukes relied on *Cox* v. *Cutler & Sons Ltd.*,[2] also a case in this court, where a clear analysis of the subsection was given by Wynn-Parry J., in which he pointed out that the "place" under section 151 (6) may be any part of the factory area as defined by section 151 (1), and concluded[3]: "At the time of the accident the western land was being used "for the purpose of reconstructing the gasholder, and, in my "judgment, that was a purpose within the meaning of sub-"section (6)." That judgment was cited and approved by Singleton L.J. in *Street* v. *British Electricity Authority*.[4] In that case, a part of a factory was already operating but part was still under construction, and the latter part was held to be a place within subsection (6). In each case it must be a question of degree whether a part of a factory is a place within subsection (6).

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[1] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; sub nom. *Thorogood* v. *Van Den Berghs and Jurgens Ltd.* [1951] 1 All E.R. 682.

[2] [1948] 2 All E.R. 665.

In *Cox* v. *Cutler & Sons Ltd.*[5] the reconstruction of the part in question was more radical than in the case before us, but, following the reasoning of that case, we think that the place of the accident in this case was within section 151 (6). The place where concrete was being broken up was a place clearly set apart and devoted by arrangement to the separate purpose of breaking up and relaying concrete. The renewal of the apron was not an incident of the processes of aeroplane assembly and testing. It is true that one could foresee that at some time or another the concrete apron would wear out and have to be relaid. One could also foresee that the hangar itself would at some time or another wear out and have to be rebuilt. But such radical replacements are not, normally speaking, recurring matters. They cannot be said to be incidental to the processes of the factory.

Therefore, in our judgment, section 151 (6) applies to the place of the accident and excludes it from the operation of the Factories Act, 1937.

The appeal therefore fails.

Appeal dismissed.

Solicitors: *Pearce & Sons; J. F. Coules & Co.*

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[3] [1948] 2 All E.R. 665, 673.

[4] [1952] 2 Q.B. 399, 410; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.

[5] [1948] 2 All E.R. 665.

COGLEY *v.* SHERWOOD.
CAR HIRE GROUP (SKYPORT) LTD. *v.* SAME.
HOWE *v.* KAVANAUGH.
CAR HIRE GROUP (SKYPORT) LTD. *v.* SAME.

1959
April 21, 22.

Lord Parker C.J., Donovan and Salmon JJ.

Metropolis—Hackney carriage—"Plying for hire"—Hire car—Company operating service of hired cars at London Airport—Cars chauffeur driven—Available for use by passengers and public—Not licensed as hackney carriages—Cars advertised at desks where bookings made—No indication at standing places that cars available for hire—Whether "plying for hire"—Metropolitan Public Carriage Act, 1869 (32 *&* 33 *Vict. c.* 115), *s.* 7.

Judicial Precedent—Divisional Court decision—Whether binding on Divisional Court—Only if impossible to distinguish.

A car hire company, under a contract with the Ministry of Transport and Civil Aviation, operated a service of chauffeur-driven motor-cars at the North and Central terminals of London Airport, available day and night at a fixed schedule of fares, for the use of passengers and members of the public admitted to the airport by the Minister. The cars were not licensed as hackney carriages. Bookings were made at desks at each terminal, where the service was extensively advertised, but there was no indication at the standings where the cars waited that they were for hire, intending passengers being escorted to one of the cars by an employee of the company. On October 28, 1958, the respondents each hired a car for a short journey from London Airport, and subsequently the company and the two chauffeurs were convicted by justices, on informations laid by the respondents, of offences under section 7 of the Metropolitan Public Carriage Act, 1869,[1] as being the owners and drivers of unlicensed hackney carriages unlawfully plying for hire:—

Held, that the words "plies for hire" in section 7 connoted some exhibition of the vehicle to the public as available for hire; that the cars in question were not exhibited to the public as being available for hire and, therefore, were not plying for hire within the meaning of section 7; and, accordingly, the justices had come to a wrong decision and the appeals must be allowed.

Griffin v. *Grey Coaches Ltd.* (1928) 45 T.L.R. 109 distinguished.

Allen v. *Tunbridge* (1871) L.R. 6 C.P. 481 approved in *Armstrong* v. *Ogle* [1926] 2 K.B. 438; 42 T.L.R. 553; *Clarke* v. *Stanford* (1871) L.R. 6 Q.B. 357 and *Gilbert* v. *McKay*, 62 T.L.R. 226; [1946] 1 All E.R. 458 considered.

Semble, that although "plying for hire" must have the same meaning in relation to hackney and stage carriages, a stage carriage such as a coach or omnibus, may be exhibited, even if it is not on view when an intending passenger buys a ticket, if a schedule of regular services is advertised and a vehicle or vehicles has been regularly performing the services for some time in full view of the public.

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[1] Metropolitan Public Carriage Act, 1869, s. 7: "If any unlicensed "hackney or stage carriage plies for "hire, the owner of such carriage shall "be liable to a penalty not exceeding "£5 for every day during which such "unlicensed carriage plies. . . . The "driver also shall in every such case "be liable to a like penalty unless he "proves that he was ignorant of the "fact of the carriage being an un-"licensed carriage."

CASE STATED by Middlesex justices sitting at Uxbridge.

On December 16, 1958, informations were laid by the respondent, Harry John Sherwood, against the appellant, Walter Joseph Cogley, and the appellant company, the Car Hire Group (Skyport) Ltd., alleging that Cogley was the driver and the appellant company the owners of an unlicensed hackney carriage which, on October 28, 1958, at North terminal, London Airport, unlawfully plied for hire, contrary to section 7 of the Metropolitan Public Carriage Act, 1869. Similar informations were laid by the respondent, John Lawrence Kavanaugh, against the appellant, William Howe, as the driver, and the appellant company, as the owners, of an unlicensed hackney carriage which, on the same date, from the Central terminal at London Airport, unlawfully plied for hire, contrary to section 7 of the Act. Both the respondents were taxi-drivers.

The justices heard the informations on January 19, 1959, and found the following facts: At London Airport there were two separate sets of buildings used for handling passengers, the Central and North terminals. The appellant company's business was to hire " self-drive " cars and also to hire cars with chauffeurs. The latter could be hired out on the spot or booked in advance. The major part of the company's business consisted of hiring cars with chauffeurs to persons who required immediate transport. The company conducted its business at both terminals. By virtue of a contract between the company and the Minister of Transport and Civil Aviation made on March 29, 1956, the company maintained and staffed at each terminal a desk at which the service they provided was well advertised. It appeared from photographs exhibited to the case that at the front of each desk notices bearing the words " Book your car here " were displayed, and there were notices (similar at each desk) giving the name and address of the appellant company, and bearing the words " Official Car Hire " Service London Airport. Cars to all parts." The contract also provided, inter alia, that the company would provide at such times during the day and night as the Minister might require and at charges specified in the contract, car hire services at the airport for the benefit of travellers, users of the airport and such other persons as might be admitted thereto by the Minister; that the company would at its own expense take out and maintain all licences and policies of insurance necessary to the use of the vehicles, and at all times comply with all statutory or other requirements relating to the use of such vehicles; and that neither the company nor its servants should solicit custom at the airport. At each terminal the company used a standing for its vehicles appointed by the Minister which was conveniently placed so as to make the vehicles readily available to any member of the public who had hired a vehicle at the desk. In the case of the Central terminal the standing was a roadway to which the public did not have access. The standing places were so defined by marks on the roadway which were not easily seen when cars were parked there. The cars appeared to be private cars, and when standing at the appointed place would not give the appearance of being cars which were available for hire; and the uniform worn by the drivers was similar to that of private chauffeurs.

In addition to the notices displayed at both the company's desks, at Central terminal there were advertisements in other parts of the main concourse and facilities for telephoning the desk from other parts of the building, and at North terminal inside the customs area there was a push-button on the wall labelled "Car "hire. Push." When the button was pushed an employee of the company attended. The company's desks were so positioned as to be plainly visible to passengers arriving at either the Central or North terminals. The advertisements and notices displayed on the desks and elsewhere were a clear intimation to members of the public who were at the airport that the services which the company provided were available for their use if desired.

With the admitted object of obtaining evidence on which to base these proceedings, on October 28, 1958, the respondents arranged for two of the company's cars to be hired, one from the Central terminal and one from North terminal. In both cases the intending car passengers desired to hire a private car from the company and approached the desks and asked to be driven to Twickenham from the North terminal and Richmond from the Central terminal respectively. At the North terminal the clerk at the desk wrote on a printed form the name of the driver and the reference number of the car. The passenger was escorted to a waiting car owned by the company and driven to Twickenham by the appellant, Cogley. At the Central terminal, the desk clerk made entries in a book and the passenger was escorted to a waiting car owned by the company and was driven to Richmond by the appellant, Howe. Both passengers were asked for and paid to the driver a fare representing three shillings per mile for the journey. The two cars used for the journeys to Twickenham and Richmond on the day in question were not licensed as hackney carriages.

It was contended by the appellants and the appellant company (a) that the two cars were not exhibited to intended passengers as being for hire or at all and there was no solicitation of intending passengers in any shape or form, and that the advertisements at the desks could not be treated as solicitation within the context of the statute; (b) that for a "plying for hire" to exist there must be a solicitation by words or conduct by either the driver or the person in charge of the vehicle of persons who had not entered into a prior contract; (c) that the solicitation of the public involved in plying for hire must be in relation to a particular vehicle; and (d) that the evidence showed that not until after the contract was made at the desk was the car or the driver selected for the journey.

It was contended by the respondents that (a) "hackney "carriage" was defined by section 4 of the Metropolitan Public Carriage Act, 1869, as "a carriage for the conveyance of pas-"sengers which plies for hire within the limits of this Act, and is "not a stage carriage." The limits of the Act were the Metropolitan Police District, the City of London and the liberties thereof. London Airport was within the Metropolitan Police District and the Act accordingly applied; (b) "plying for hire" really meant carrying out the business of carrying passengers for hire or reward: that by applying the principles of common sense the evidence showed that the cars in question were in fact acting as taxi-cabs and that as the cars were not licensed as hackney carriages the offences alleged had been committed.

The justices, having referred to section 4 of the Act, decided that London Airport was within the limits of the Act and the vehicles concerned were clearly "carriages for the conveyance of "passengers," were not stage carriages, and were not licensed as hackney carriages. Their decision accordingly rested on their finding whether or not the vehicles were "plying for hire." They considered all the cases quoted to them and failed to extract therefrom a comprehensive and authoritative definition of "plying for "hire." Whatever such a definition might be, they expressed the view that it must include a solicitation of the public to be forthwith conveyed in a carriage which was "readily" available to an agreed destination for an agreed fare. On the authorities, it appeared to them that the solicitation might be not only by words but by the exhibition of the vehicles, public display of advertisements, or a combination of both, and, in their opinion, any acts, words, notices or conduct which brought to the notice of a member of the public that a vehicle was readily available to transport him to his destination on payment of a fare. The fact that a vehicle was on view had, in their opinion, merely a high evidential value and was not an essential condition of plying for hire. Indeed, it was not necessary that at the time that the agreement was reached by the hirer and the passenger for the passenger's conveyance that the actual driver or the vehicle to be used was known (*Griffin* v. *Grey Coaches Ltd.*[2]).

The justices rejected a submission that on the authority of *Hunt* v. *Morgan*[3] a vehicle could, in law, only ply for hire if it was standing on a properly authorised rank or was stationary in a public street. They took the view that the ratio decidendi of *Hunt* v. *Morgan*[3] was not what constituted "plying for hire" but what was "a place" at which a hackney carriage which was in fact plying for hire was compelled to accept a fare. They considered that the facts in *Griffin* v. *Grey Coaches Ltd.*[4] and the present cases had two substantial similarities: in both cases the existence of the service offered to the public was made known by advertisement, and the vehicle used was not on view or allocated to the particular journey at the time the agreement for the journey was made. They came to the conclusion that a part of the company's ordinary business was to provide transport immediately on request for a fare. To do so the company kept cars and drivers at a reasonably accessible place ready for immediate use. The company offered its services to the public at London Airport by manning desks on which were displayed notices and advertisements at the place where they were most likely to be seen by the passengers arriving by air and, indeed, did their best to advertise their services. In the justices' opinion that constituted a solicitation of the public to hire the company's cars which were immediately available and, accordingly, they decided that the company's vehicles were plying for hire. They convicted the appellants and the appellant company of the offences charged and ordered their absolute discharge. They ordered the company to pay £12 12s. costs. The appellants and the appellant company appealed.

The question for the opinion of the court was whether or not the justices were right in law in finding that the vehicles in question were "plying for hire."

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[2] 45 T.L.R. 109.

[3] [1949] 1 K.B. 233; 65 T.L.R. 15; [1948] 2 All E.R. 1065.

[4] 45 T.L.R. 109.

Neil Lawson Q.C. and *W. A. Macpherson* for the appellants. The only question is whether the two cars were "plying for hire" within the meaning of section 7 of the Metropolitan Public Carriage Act, 1869. If they were not, they were not hackney carriages, and therefore licences were unnecessary. If the contention of the prosecutors is correct, whenever a car hire company carries passengers for hire and reward the vehicles used are necessarily plying for hire and unless licensed as hackney carriages offences are committed against section 7 of the Act. In this case the justices considered the authorities relating to stage carriages as well as those concerning hackney carriages, but it is essential to observe the difference between the activities of stage carriages and those of private hire cars. A stage carriage normally uses a regular route at regular times, holding out thereby a promise to the public to appear regularly at a certain place and undertake a particular journey. A private hire car is hired to go to any destination at any time at an agreed rate.

The authorities relating to hackney carriages as distinct from stage carriages show (1) that plying for hire has to be considered in relation to the particular vehicle and not in relation to its owner, and (2) that a necessary feature of plying for hire is the presence of the vehicle ready at any moment to be hired by the customer. *Case* v. *Storey*,[5] *Clarke* v. *Stanford*[6] and *Allen* v. *Tunbridge*,[7] in each of which the question of whether a hackney carriage was plying for hire arose, were decisions of the Courts of Exchequer, Queen's Bench and Common Pleas respectively which concerned carriages standing within the precincts of railway stations ready to convey passengers arriving by train. In *Case* v. *Storey*[8] the Court of Exchequer held that a carriage standing on the premises of a railway company by their leave for the accommodation of passengers arriving by train was plying for hire. The case concerned another Act and the decision has since been superseded, but reliance is placed on the observations of Kelly C.B.[9] as to the meaning of the words "plying for hire," namely, "the carriage is at the disposal of any one of the public "who may think fit to hire it."

The circumstances were similar in *Clarke* v. *Stanford*,[10] where there was a prosecution under section 7 of the Act of 1869. The Court of Queen's Bench held that there was a plying for hire within the meaning of the Act because the presence of the vehicle in the railway yard constituted a solicitation of the public to hire it. That decision was followed by the Court of Common Pleas in *Allen* v. *Tunbridge*,[11] but in the latter case there was a verbal solicitation by the driver. When considering solicitation of the public, there is an important difference in principle between solicitation by the presence of a vehicle in full view of the public and solicitation by advertisement as in the present case.

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[5] (1869) L.R. 4 Ex. 319.
[6] (1871) L.R. 6 Q.B. 357.
[7] (1871) L.R. 6 C.P. 481.
[8] L.R. 4 Ex. 319.
[9] Ibid. 323.
[10] L.R. 6 Q.B. 357.

[LORD PARKER C.J. One of the essential ingredients in plying for hire appears to be that a particular vehicle should be held out as available to be hired by a member of the public who comes to it. Any system whereby booking or advertisement is done at an agency destroys that because the intending passenger is not assigned the vehicle he picks out but one someone else picks out for him.]

It should be pointed out that in *Foinett* v. *Clark* [12] carriages standing on part of a railway yard rented exclusively by their owner ready to be hired by railway passengers were held to be plying for hire although the drivers had instructions not to solicit and passengers took their tickets at an office. In that case the court applied the definition of plying for hire given by Kelly C.B. in *Case* v. *Storey*.[13]

[LORD PARKER C.J. From those authorities it seems that a vehicle which is plying for hire must be exhibited.]

That point was raised in *Cavill* v. *Amos*,[14] where there was a prosecution under the Town Police Clauses Act, 1847. There a taxicab which was held to be plying for hire was exhibited, but it was suggested that there might be a plying for hire although the vehicle was not exhibited if a man went about touting for customers. The striking feature of *Gilbert* v. *McKay*,[15] which was cited to the justices, was that a large number of vehicles—which were held by the court to be plying for hire—was exposed in a public street in much the same way as taxicabs are exhibited on public stands in public streets.

It is submitted that the authorities relating to stage carriages show (1) that there must be solicitation by the driver or person in control of the vehicle, and (2) the person soliciting must be in possession of the carriage for which he is soliciting or waiting to obtain passengers: *Sales* v. *Lake*,[16] *per* Lord Trevethin C.J.[17] In *Armstrong* v. *Ogle*,[18] where an omnibus was held to be plying for hire, Lord Hewart C.J. set out the principle to be applied.[19] That case stresses the fact that in posing the test: Is it plying for hire? in relation to a stage carriage, the regularity of the carriage along a definite route and its availability to any member of the public who has knowledge of its regular use of that route and its readiness to carry passengers can amount to solicitation. [Reference was also made to *Leonard* v. *Western Services Ltd.*[20]] In *Griffin* v. *Grey Coaches Ltd.*[21] the decisive factor in finding that there was a plying for hire was the existence of posters advertising the regular times and routes of coaches travelling from Brighton to London which amounted to a solicitation of the public by advertisement to take tickets for a vehicle which, although not exhibited to the public at the times tickets were taken, would be produced to undertake a particular journey at a particular advertised time. It was not a case where a person made a private contract to hire a car for a particular journey at any time to any place.

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[11] L.R. 6 C.P. 481.

[12] (1877) 41 J.P. 359.

[13] L.R. 4 Ex. 319, 323.

[14] (1899) 16 T.L.R. 156.

[15] [1946] 1 All E.R. 458; 62 T.L.R. 226.

[LORD PARKER C.J. If it had not been for that case the justices might well have come to a different conclusion.]

Yes. The authorities taken as a whole make it clear that the activities of the owner of the vehicle for hire and the activities of the vehicle itself must not be confused. It is the vehicle which plies for hire. The statute does not prevent people from letting unlicensed vehicles out on hire. To establish that a vehicle is plying for hire two elements have to be present. There has to be a solicitation by words or conduct by the persons in charge of a particular vehicle and there has to be an attraction to the public by means of the particular vehicle which is held out as available for hire.

When considering section 7 of the Act it is not unimportant to bear in mind that the legislature was there concerned to prevent the use of unlicensed hackney and stage carriages, first, because of the danger of obstruction referred to in *Hunt* v. *Morgan*,[22] and, secondly, because of the necessity of ensuring the competence of the drivers and the fitness of the vehicles for the conveyance of members of the public. When applying section 7 to the circumstances of the present case these circumstances are absent and there is nothing which compels the court to hold that these cars are hackney carriages.

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[16] [1922] 1 K.B. 553; 38 T.L.R. 336.

[17] [1922] 1 K.B. 553, 558.

[18] [1926] 2 K.B. 438; 42 T.L.R. 553.

[19] [1926] 2 K.B. 438, 445.

[20] [1927] 1 K.B. 702; 43 T.L.R. 131.

[21] (1928) 45 T.L.R. 109.

[22] [1949] 1 K.B. 233; 65 T.L.R. 15; [1948] 2 All E.R. 1065.

The justices, who dealt with this matter with great care, were wrong on the question of solicitation of the public. In saying that certain of the facts in *Griffin* v. *Grey Coaches Ltd.*[23] and the present case were similar they completely overlooked the vital differences between a coach service operating on a regular route and a private hire car which can be hired by any person who wishes to hire it for a particular purpose.

[LORD PARKER C.J. There is in practice a difference between stage carriages and private hire cars, but where is the difference in the words "ply for hire"? The appellants must show that in the case of a private car or carriage the essence of plying for hire is the holding out of the particular vehicle, whereas in the case of a stage carriage it is the holding out of the particular service.]

It is submitted that the legislature contemplated a difference between the two because in the Act a stage carriage is defined with reference to place of plying for hire, whereas a hackney carriage is a vehicle which plies for hire "within the limits of "this Act": see section 4. If "hackney carriage" had been defined in relation to a street or place, these appeals would not be before the court, because London Airport is private property and the cars were not standing in a public street or place. [Reference was made to *Hunt* v. *Morgan*.[24]] It may be that in relation to a stage carriage "ply for hire" has the same meaning as in the Oxford English Dictionary, i.e., from place to place. It may apply not only to what happens preliminary to but during the hiring. If the justices' decision is correct, then every car hire company which advertises the services of its cars will be offending against section 7 unless it is made clear that some hours' notice is necessary before an intended hirer can be provided with a vehicle. The justices have confused the way in which the hirers carry on their business and the activities of the vehicles themselves. In the present case that difference is basic. The justices were wrong and the appeals should be allowed.

James Borders for the respondents. If the appellants abandon the exhibition of the particular vehicle as an essential element of soliciting the public, this case comes back to *Gilbert* v. *McKay*.[25] The only essential difference between that case and the present is that in *Gilbert* v. *McKay*[25] the vehicles were on a stand in a public street so that they were exhibited. But apart from that the case is on all fours with this case. Here the cars take their places at the Central and North terminals at London Airport. Members of the public who wish to hire a car ask for it at the office and one is allocated. At one terminal they can be seen by members of the public and at the other they cannot. The extensive advertisements that they are available for hire is evidence of solicitation. The hackney carriage cases are no authority for the proposition that a particular vehicle must be allocated. Reliance is placed on the definition of plying for hire given by Lord Trevethin C.J. in *Sales* v. *Lake*.[26]

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[23] 45 T.L.R. 109.

[24] [1949] 1 K.B. 233.

[25] [1946] 1 All E.R. 458.

[Lord Parker C.J. One must look at that definition in relation to the facts of that case, which concerned a charabanc. The principle was laid down by Montague Smith J. in *Allen* v. *Tunbridge*.[27] The difficulty is to apply it to the facts of each case.]

All the definitions of plying for hire in the cases seem to be on all fours with the definition the justices have adopted in the present case. There is no definition which lends colour to making plying for hire applicable only where the particular vehicle is being exhibited.

[Donovan J. If the true view is that one has to look at the activities of the vehicle itself and not at what the owner is doing, it might be possible to say that in *Gilbert* v. *McKay*[28] the vehicles were plying for hire but that in this case they were not.]

It is submitted that there was evidence here that the vehicles were plying for hire, and, unless the appellants can prove that the justices' reasoning was wrong, this court cannot interfere with their decision. The appellants must show that there is a difference with regard to the exhibition of a stage carriage and a private hire car. Unless they can do so this case is beyond dispute. There is no such distinction as they seek to draw. *Griffin* v. *Grey Coaches Ltd.*[29] is authority for the proposition that a stage carriage need not be on view to the public. The essential difference between a stage carriage and a hackney carriage is that in a stage carriage passengers are charged separate fares for distinct stages, whereas in a hackney carriage that is not so. Taxicab cases on the question of plying for hire do not deal with the point raised concerning the availability for hire of the particular vehicle. In *Skinner* v. *Usher*[30] a licensed hackney carriage standing on a piece of ground opposite a railway station which crossed over to the station to pick up a passenger was held to be soliciting or waiting and accordingly plying for hire. These cars were doing exactly the same thing. They were under someone else's control, but they were waiting for passengers with whom they had no previous contract. [Reference was made to *Birmingham Midland Motor Omnibus Co.* v. *Thompson.*[31]]

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[25] [1946] 1 All E.R. 458.
[26] [1922] 1 K.B. 553, 558.
[27] L.R. 6 C.P. 481, 485.
[28] [1946] 1 All E.R. 458.
[29] 45 T.L.R. 109.

[DONOVAN J. It may be difficult to draw a parallel between that case, which concerned motor-buses going regularly along a street to a garage, and this case.]

In considering this question all the facts must be taken into account. There was ample evidence of solicitation by reason of the advertisements at the airport and the fact that plenty of cars were available. Vast numbers of persons at the airport could see the passengers conducted to the cars. It is obvious that plying for hire was going on. There is nothing to prevent the appellant company from obtaining hackney carriage licences and so conducting their business lawfully. Their agreement with the Minister provides specifically that they should take out all necessary licences. That is a very comprehensive provision when it is remembered that all that has to be done in the case of a motorcar is to obtain a road licence and insure the car. On the facts as found, there was evidence that the cars were plying for hire, and unless the appellants can show that the justices have erred in law, and it is submitted they cannot, the appeals must fail.

J. R. Cumming-Bruce intervening for the Minister of Transport and Civil Aviation. On the question of plying for hire it is interesting to observe the language used in the earlier statutes where the legislature has drawn a distinction between a carriage "let for hire" and one plying for hire. That distinction had been maintained as far back as 1694: see 5 & 6 W. & M., c. 22, ss. 5 and 6. In the Hackney Carriage Act, 1831, the words used in section 22 are "if any person shall keep, use, employ or let "to hire any hackney carriage . . ." and in section 23 "if any "carriage shall be used for the purpose of standing or plying for "hire as a hackney carriage in any public street or place." In section 4 hackney carriage is defined as "a carriage . . . which "shall be used for the purpose of plying for hire in any public "street or road . . ." It is clear, therefore, that sections 22 and 23 distinguish between the case where letting for hire is envisaged and plying for hire. The latter words seem to be selected as apt for cases where the vehicle is on view in a street or place. In the Act of 1869 the words "letting for hire" are not used at all. It is only the ordinary use of language to distinguish between letting for hire and plying for hire. It emerges from the reasoning of the justices set out in the case that they considered themselves compelled by successive authorities to conclude that operations commonly thought of as falling within the category of letting for hire have to be regarded in this context as plying for hire. That conclusion must be regarded with some suspicion in the light of the growth of the private hire industry over the past 50 years. Up to the present no one has sought to control or bring it within the ambit of the Act of 1869. It may be that during all that time the industry has been acting unlawfully, but it is submitted that in such circumstances the court will construe the section and consider its application with great care before finding that it has to be construed so widely as to affect the growth of this industry which is now so widespread. It is submitted that on the construction of section 7, in the case of hackney carriages exhibition of the vehicle for the purpose of attracting customers is an essential ingredient of plying for hire. In the case of a stage carriage there is an element of attraction to passengers by exhibition which arises from the frequent and regular passage of the vehicles along a known route.

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[30] (1872) L.R. 7 Q.B. 423.

[31] [1918] 2 K.B. 105.

[SALMON J. That involves construing the words "plies for "hire" in two different ways.]

It is submitted that that is not so. They are merely two different modes of exhibiting. There is, particularly among courts of summary jurisdiction, an obvious temptation, when faced with a problem of construction, not to start with the words of the statute but to be beguiled into examining the cases in which the courts have dealt with a series of analogous facts and being forced to a conclusion which is difficult to reconcile with the language of the statute. That is what the justices have done here. Section 7 is not apt to deal with the licensing of vehicles let to hire, but, as a result of the authorities, the justices have reached the conclusion that the words "plies for hire" deal with every case of letting for hire.

Borders replied.

Lawson Q.C., in reply, adopted the argument put forward by Cumming-Bruce.

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COGLEY
v.
SHERWOOD.
CAR HIRE
GROUP
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v.
SAME.
HOWE
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KAVANAUGH.
CAR HIRE
GROUP
(SKYPORT)
LTD.
v.
SAME.

LORD PARKER C.J. This is an appeal by way of case stated by justices for the county of Middlesex sitting at Uxbridge, before whom four informations were preferred charging offences against section 7 of the Metropolitan Public Carriage Act, 1869, in that the appellants were respectively the owners and drivers of two unlicensed hackney carriages, which had unlawfully plied for hire. The justices, after very careful consideration of the authorities, felt constrained to hold that the offences were proved. They convicted the appellants accordingly, but gave them an absolute discharge, ordering in the case of the appellant company that it should pay 12 guineas costs. [His Lordship stated the facts and continued:]

The Metropolitan Public Carriage Act, 1869, provides, so far as it is relevant to these proceedings, by section 2 that: "The limits of this Act shall be the Metropolitan Police District "and the City of London and the liberties thereof." By section 4, which is the definition section, it is provided that: "In this Act "'stage carriage' shall mean any carriage for the conveyance "of passengers which plies for hire in any public street, road or "place within the limits of this Act, and in which the passengers "or any of them are charged to pay separate and distinct or at "the rate of separate and distinct fares for their respective places "or seats therein. 'Hackney carriage' shall mean any carriage "for the conveyance of passengers which plies for hire within the "limits of this Act, and is not a stage carriage." Finally, section 7 provides that: "If any unlicensed hackney or stage "carriage plies for hire, the owner of such carriage shall be liable "to a penalty not exceeding £5 for every day during which such "unlicensed carriage plies. . . ."

It is quite clear that London Airport is within the limits of the Act, and the only question therefore falling to be determined in these proceedings is whether either or both of the two cars were plying for hire. If they were, then they were clearly unlicensed, and an offence was committed.

The court has been referred to a number of cases from 1869 down to the present day dealing with hackney carriages and stage carriages. Those decisions are not easy to reconcile, and like the justices, with whom I have great sympathy, I have been unable to extract from them a comprehensive and authoritative definition of "plying for hire." One reason, of course, is that these cases all come before the court on case stated, and the question whether a particular vehicle is plying for hire, being largely one of degree and therefore of fact, has to be approached by considering whether there was evidence to support the justices' finding.

In those circumstances it was unnecessary, and clearly inadvisable, for the court to attempt to lay down an exhaustive definition. Indeed, that was specifically referred to by Lord Hewart C.J. in *Griffin* v. *Grey Coaches Ltd.*[1] in 1928. Lord Hewart C.J. said[2]: "In the course of the argument reference has "been made to a considerable number of cases, and attention "has been directed to the occasional narrowness of the field of "argument and decision in those cases. But it is to be observed "that cases on this interesting question of plying for hire usually "turn upon the question whether there was or was not evidence "in the particular facts of the case justifying the conclusion "arrived at by the justices. Nowhere is there any attempt to "formulate an exhaustive definition of the meaning of the term "'plying for hire; . . .'"

I think the proper course is to start with the words of the Act and to construe them, before seeing whether there are any decisions binding upon us which constrain us to put a different construction upon the words. Approaching the matter in this way, the first thing that strikes one is that the Act is dealing with carriages plying for hire, not with persons carrying on the business of letting out carriages. It is the carriage that must ply for hire, and, though a human agency must clearly be involved, the Act is directing one's attention to the carriage under consideration and posing the question: is *it* plying for hire? While no doubt in 1869 persons were engaged in letting out carriages on hire, the legislature clearly could not then envisage the considerable business which has grown up of recent years of hiring out cars. Indeed today, as a matter of common sense, I do not think that anyone would say that vehicles belonging to the many car hire concerns are plying for hire in the ordinary sense of the word. It seems to me that the Act is prima facie dealing with a particular carriage whose owner or driver invites the public to be conveyed in it.

The idea is well set out by Montague Smith J. in *Allen* v. *Tunbridge*,[3] where he said[4]: "I am of the same opinion upon "the authority of the case in the Queen's Bench. It appears "to have been held there that, if the proprietor of a carriage "sends it to a place for the purpose of picking up passengers,

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[1] (1928) 45 T.L.R. 109.

[2] Ibid. 110.

[3] (1871) L.R. 6 C.P. 481.

[4] Ibid. 485.

"that is a plying for hire within the Act. That is very different "from a customer going to a job-master to hire a carriage."

Indeed that passage was approved in *Armstrong* v. *Ogle*.[5] In that case Lord Hewart C.J. said[6]: "What is the principle "to be applied? It was stated in a single sentence by Montague "Smith J. in *Allen* v. *Tunbridge*[7] where he said (referring to a "previous case): 'It appears to have been held there, that, if "'the proprietor of a carriage sends it to a place for the purpose "'of picking up passengers, that is a plying for hire within the "'Act. That is very different from a customer going to a job-"'master to hire a carriage'"; then Lord Hewart said[8]: "The "contrast is between a particular and definite private hiring and "a public picking up of passengers."

The decision in *Allen* v. *Tunbridge*[9] was a decision of the Court of Common Pleas, but the same idea is, I think, behind the contemporary decisions in the courts of Queen's Bench and the Court of Exchequer. Thus in *Case* v. *Storey*[10] Kelly C.B., in referring to the words "plying for hire" under a different Act, said[11]: "Those words must mean that the carriage is to be at "the disposal of any one of the public who may think fit to "hire it."

In *Clarke* v. *Stanford*[12] Cockburn C.J. said[13]: "But where "a person has a carriage ready for the conveyance of passengers, "in a place frequented by the public, he is plying for hire, al-"though the place is private property." Mellor J. said[14]: "But "what is the carriage there for? Though the driver makes no "sign, he is there to be hired by persons who arrive by train, "and there is no restriction as to the persons who, arriving by "train, shall hire the carriage; it is therefore plying for hire, "within the meaning of the statute." Lush J. said[15]: "This "carriage was awaiting the arrival of a train, in order to be hired "by any person who might come by the train. That is a plying "for hire within the meaning of this statute."

In the ordinary way, therefore, I should, apart from authority, have felt that it was of the essence of plying for hire that the vehicle in question should be on view, that the owner or driver should expressly or impliedly invite the public to use it, and that the member of the public should be able to use that vehicle if he wanted to. Looked at in that way, it would matter not that the driver said: "Before you hire my vehicle, you must take "a ticket at the office," aliter, if he said: "You cannot have "my vehicle but if you go to the office you will be able to get "a vehicle, not necessarily mine."

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[5] [1926] 2 K.B. 438; 42 T.L.R. 553.

[6] [1926] 2 K.B. 438, 445.

[7] L.R. 6 C.P. 481, 485.

[8] [1926] 2 K.B. 438, 445.

[9] L.R. 6 C.P. 481.

[10] (1869) L.R. 4 Ex. 319.

[11] Ibid. 323.

[12] (1871) L.R. 6 Q.B. 357.

[13] Ibid. 359.

[14] Ibid. 360.

[15] Ibid.

There are, however, some cases which point to a different conclusion. For my part, however, I find it unnecessary to go into them and for this reason. In all the cases where it has been held that a carriage was plying for hire, it was in fact there and on view. Thus, in *Gilbert* v. *McKay* [16] cars were held to be plying for hire even though, as I assume, a member of the public could not choose his vehicle, but be that as it may, the vehicles were clearly on view, they were standing, like taxis might stand on a rank, outside offices bearing the sign "Cars for Hire." It is true that in that case it was suggested that there might be a plying for hire even if the cars were not on view, and the same appears in *Cavill* v. *Amos*,[17] where Channell J.,[18] in giving judgment, said: "In ordinary cases, in order that there should be "a plying for hire, the carriage itself should be exhibited. He "thought, however, that a man might possibly ply for hire with "a carriage without exhibiting it, by going about touting for "customers." For myself I think that it is of the essence of plying for hire that the carriage should be exhibited.

Here I think it is clear that the cars in question were not exhibited in this sense of the word. As I have said, the only cars that were on view were at one terminal, and to any ordinary member of the public they did not appear to be for hire; they appeared merely to be ordinary private cars with private chauffeurs.

It is said, however, that the cases concerning stage carriages and in particular the case of *Griffin* v. *Grey Coaches Ltd.*,[19] to which I have already referred, force one to a different conclusion. Indeed, I think it was that case that chiefly influenced the justices. Thus in setting out their reasons, they say this: "Indeed it is "not necessary that at the time the agreement is reached by the "hirer and the passenger for the passenger's conveyance that "the actual driver or the vehicle to be used is known (*Griffin* v. "*Grey Coaches Ltd.* [19])." A little later on they say: "We "considered that the facts in *Griffin* v. *Grey Coaches Ltd.*[19] and "the cases before us had two substantial similarities: in both

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[16] [1946] 1 All E.R. 458; 62 T.L.R. 226.

[17] (1899) 16 T.L.R. 156.

[18] Ibid. 157.

[19] 45 T.L.R. 109.

" cases the existence of the service offered to the public was made " known by advertisement and the vehicle used was not on view " or allocated to the particular journey at the time the agreement " for the journey was made."

In *Griffin's* case,[19] which concerned a stage carriage, the company, Grey Coaches Ltd., were owners of motor charabancs, plying at regular hours between London and Brighton. The question was whether the vehicles were plying for hire at Brighton, in respect of which there was no licence. It appears that there were extensive advertisements exhibited at the office in Brighton advertising the times of departure of the charabancs, and tickets could be purchased at the office up to 10 minutes before the advertised time, but not afterwards. At the time when the tickets were purchased there was no charabanc in the garage adjoining the office, and it was not until 20 minutes later that the charabanc was driven up by one of the company's servants into the yard to take on the passengers. In the course of his judgment Lord Hewart C.J. said [20]: " What is the real difference, " apart from mere accidental difference, between that state of " affairs and the state of affairs which exists where the driver of " the coach, by gesture or by words, invites the members of the " public to board, and to travel upon, a vehicle which they can " see? It may be, as has been said, that the particular coach " was not then appropriated to the particular journey. It was " waiting to be appropriated; it was in a proper and convenient " place for that very purpose."

I do not think that that decision in regard to a stage carriage is compelling authority in the present case. This court, of course, treats itself as bound by its own decisions. There is, however, at present no appeal, and that being so, I do not think that the court should treat itself as bound by a previous decision unless there can be said to be no real distinction. It is true that " plying for hire " must have the same meaning whether applied to stage carriages or hackney carriages. In the former case, however, it may well be far easier to find a plying for hire. Indeed, where a schedule of regular services is advertised and a vehicle or vehicles has been performing those services for some time in full view of the public, there is something to be said for the view that they are exhibited in the sense that I have indicated, even though a particular vehicle is not on view when the ticket is bought. I do not think that *Griffin's* case [21] compels

[19] 45 T.L.R. 109.

[20] Ibid. 111.

[21] 45 T.L.R. 109.

me to come to a conclusion in regard to hackney carriages different from that indicated earlier in this judgment.

In my judgment the justices were wrong in treating this case as indistinguishable from *Griffin's* case.[21] No conceivable blame attaches to them, and indeed the court is grateful for the clear reasoning set out in the case upon which their decision was based. I would allow this appeal.

DONOVAN J. The Lord Chief Justice has already quoted the definition of "hackney carriage" in section 4 of the Act of 1869, and I need not repeat it. Section 6 gives the Secretary of State power to license to ply for hire both stage carriages and hackney carriages within the territorial limits of the Act, namely, the Metropolitan Police District and the City of London and the liberties thereof. Section 9 gives him power to make regulations, inter alia, for fixing the stands of hackney carriages; section 7 provides that if any unlicensed hackney carriage plies for hire or uses one of the fixed stands, the owner is liable to a continuing penalty.

The motor-cars concerned in the present case are hackney carriages within the definition in section 4, and London Airport is within the territorial limits of the Act. The sole issue is whether these cars, in the circumstances detailed in the case, "ply for hire" within the meaning of section 7.

When that section was enacted hackney carriages were, I suppose, solely horse-drawn, and indeed one meaning of the word "hackney" is "an ambling horse." The purpose of the Act of 1869 was clearly to exercise control over these vehicles so as to ensure a proper standard of safety and cleanliness, and of competency in their drivers, for the driver had to be licensed too under section 9. The motor-car has now displaced the horse carriage and the competence, at any rate, of the driver is ensured, so far as it can be, by other legislation. In addition, a very large business has grown up of private hire of motor-cars. These new conditions do not mean that plain words in the statute are now to be given something other than a plain meaning. They do, however, in my view involve that when the court is asked to apply the language of 1869 to the vastly different circumstances of 1959, then a very close scrutiny of the words is called for.

The expression "ply for hire" is not defined in the statute, and I would respectfully concur in the justices' finding that no comprehensive definition is to be found in the decided cases.

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[21] 45 T.L.R. 109.

But the term does connote in my view some exhibition of the vehicle to potential hirers as a vehicle which may be hired. One can perhaps best explain the reason by taking an example. It is a fairly common sight today to see in smaller towns and villages a notice in the window of a private house "Car for Hire." If the car in question is locked up in the owner's garage adjacent to the house, it could not in my view reasonably be said that at that moment the car was "plying for hire." If a customer wishes to hire it, he comes and makes his terms with the owner. On the return journey the owner might exhibit a sign on its windscreen, as some of them do, "Taxi" and then clearly he would be plying for hire. Similarly, if he left the car outside his house, the same notice on the car would involve, I think, that the car was then plying for hire, and the notice in the window might also then have the same effect.

The essential difference in the circumstances that I have compared is that in the one case the car is not exhibited at all, whereas in the other it is, coupled with the notification that it may be hired. I am fortified in suggesting a test of exhibition by several considerations. The first is that there is no decided case where a hackney carriage was held to be plying for hire where it was not exhibited so as to be visible to would-be customers. In *Gilbert* v. *McKay*[22] the cars were just outside the premises of the car hire firm, which bore advertisements that cars were for hire.

Secondly, in section 7, the words are: "If any unlicensed . . . "carriage plies for hire," thus indicating that one is to look and see what the vehicle itself is doing, albeit under human agency. I find it very difficult to say that a vehicle which is not exhibited in some way is a vehicle plying for hire. Like my Lord, I do not regard the decision in *Griffin* v. *Grey Coaches Ltd.*[23] as antagonistic to this view. There it is true that the charabanc was not on view at the time that the passenger booked his seat. But the court was dealing with a regular service at regular times along a regular route. One can, I think, exhibit a vehicle such as an omnibus or a charabanc just as effectively for the purpose of hire in this way as by any other. By these means it will come to the notice of prospective customers, which after all is the object of exhibition.

The court is dealing in this case with two particular vehicles, one engaged from the Central terminal, and one from the North terminal of London Airport. The case finds that at the Central terminal the cars stood while waiting to be hired on a roadway to which the public had no access. There is no such precise finding, I think, as to the situation of the standing at the North terminal, but there is certainly no evidence that at either standing there was any notice that the cars, or any of them, were for hire. This, no doubt, explains the contention put in the forefront of the appellants' case, namely, that the two cars were not exhibited to intended passengers, or at all. This is not met by any opposing contention on the part of the respondents. The justices appear to deal with the case on the footing that the cars were not on view, for they say in effect that, despite this, the decision in *Griffin* v. *Grey Coaches Ltd.*[23] compelled them to the conclusion that this circumstance was inconclusive.

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[22] [1946] 1 All E.R. 458.

[23] 45 T.L.R. 109.

I have already stated why, in my view, the charabancs concerned in that case were in fact on view. If, then, the two cars with which this case is concerned were not exhibited to the public as being available for hire, I think it is wrong to say of these vehicles that they were then hackney carriages "plying for "hire."

The respondents' main contention begins in this way: plying for hire really means carrying out the business of carrying passengers for hire or reward. With respect, I think this suggested definition is misleading. The business is carried on by the owners of the cars and section 7 is not designed to regulate that business as such. It deals with the vehicle itself, and enacts that the vehicle shall not, if unlicensed, ply for hire. Of course the vehicle can do nothing except under human control, but the section is contemplating the function which the vehicle itself is fulfilling, albeit under human control, at a particular time.

I do not find it possible to say that a hackney carriage not on view to the public is, when not so on view, plying for hire, particularly when at the same time there is no indication in or around it that it ever does such work. I agree with the judgment of the Lord Chief Justice, and, accordingly, like him, I would allow this appeal.

Salmon J. I also agree, although not without some doubt, that, for the reasons stated by my Lord, this appeal should be allowed. Such doubt as I feel springs not from the words of the statute, which appear to me to be reasonably plain, but from the multifarious decisions upon it. If the matter were res integra, I should have thought that it was obvious that the words "plying for hire" have a meaning different from and narrower than "letting for hire" or "carrying on a private hire business." But for authority, I should have thought that a vehicle plies for hire if the person in control of the vehicle exhibits the vehicle and makes a present open offer to the public, an offer which can be accepted, for example, by the member of the public stepping into the vehicle.

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[23] 45 T.L.R. 109.

In cases such as these, the member of the public knows nothing, and has no time to make any inquiry about the vehicle or the standing or, indeed, the identity of the owner. It is not surprising that in such cases Parliament should make arrangements that the vehicles which so ply for hire shall be of a certain standard of safety and comfort upon which the member of the public can rely.

But from time to time in the past people owning vehicles which were plying for hire have exercised their ingenuity for circumventing the provisions of the Act of 1869, and on a large number of occasions this court has had to consider those attempts. During the course of the years, observations have been made which deal with the particular circumstances of a case, and these have been adopted and expanded in other cases; and so we have come to a position where, on the authorities, it is possible, as has been pointed out by Mr. Cumming-Bruce, to make a powerful argument, as Mr. Borders has done, for holding that this Act means something quite different from what any ordinary man would think that it meant on reading it.

Indeed, this court, to my mind, is driven to the very brink of saying that whenever a private hire firm has a fleet of motor-cars in its garage and advertises for customers, those motor-cars are plying for hire. That seems to me to be quite wrong. It was never within the contemplation of the legislature that the job-master (who was the counterpart in 1869 of the car hire service of 1959), should be within the Act, as was pointed out by Montague Smith J. in *Allen* v. *Tunbridge*[24] as long ago as 1871. I do not feel that we are constrained by authority to cross the brink. Although authority precludes a finding that the making of a present open offer is a necessary part of "plying for hire," I do not feel compelled by any authority to find that a vehicle plies for hire unless

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[24] L.R. 6 C.P. 481.

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LTD.
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it is exhibited. In this case the vehicles were not, as my Lords have pointed out, exhibited, and for that reason I agree that this appeal should be allowed.

Appeal allowed.
Order for costs made by justices to be discharged.
No other order as to costs.

Solicitors: *Coward, Chance & Co.; Alexander Charles, Leytonstone; Treasury Solicitor.*

E. M. W.

C. A.

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Romer and Ormerod L.JJ.

MACFARLANE *v.* GWALTER.

Public Health—Nuisance—Cellar—Grating in pavement—Liability of occupier of adjoining premises to repair where grating dedicated as part of highway—Liability for accident arising through non-repair—Public Health Acts Amendment Act, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 35 (1).

Nuisance—Highway—Obstruction.

A grating in the pavement of a public highway was in bad condition and was found to constitute a dangerous trap. The purpose of the grating, which had probably formed part of the highway when it was dedicated, was to admit light to the cellar window of an adjoining building and the defendant, who was the occupier of that building, knew of the condition of the grating and had failed to repair it. The plaintiff was walking along the pavement when her leg went through the grating and she was injured. She claimed damages for injury caused by nuisance arising from breach of the defendant's duty imposed by section 35 (1) of the Public Health Acts Amendment Act, 1890 [1]:—

Held, that, as the defendant was the occupier of the building adjoining the grating, he was under a duty to repair it by section

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[1] Public Health Acts Amendment Act, 1890, s. 35 (1): "All vaults, "arches and cellars under any street, "and all openings into such vaults, "arches, or cellars in the surface of "any street, and all cellar-heads, "gratings, lights, and coal-holes in "the surface of any street, and all "landings, flags, or stones of the "path or street supporting the same "respectively, shall be kept in good "condition and repair by the owners "or occupiers of the same, or of the "houses or buildings to which the "same respectively belong."

[Reported by M. B. KELLY, Esq., Barrister-at-Law.]

35 (1) of the Act of 1890 even though it was part of the highway; and that, whether or not a breach of duty imposed by the section would by itself give rise to a remedy, since, the defendant having failed in his duty, the structure fell out of repair and became thereby a nuisance on the highway, the defendant was liable to the plaintiff for her injuries caused by that nuisance.

Russell v. *Men of Devon* (1788) 2 Term Rep. 667 applied.

Penney v. *Berry* [1955] 1 W.L.R. 1021; [1955] 3 All E.R. 182 distinguished.

Appeal from Judge Glazebrook sitting at Gravesend County Court.

On October 27, 1956, the plaintiff, Margaret MacFarlane (an infant, suing by her next friend), was walking along the pavement in Clarence Street, Gravesend, when her left leg went through an iron grating and she was injured. The grating was old, and in bad condition, one of the bars having broken and fallen into the area below. In an action for damages the county court judge found that the grating was a dangerous trap to passers-by and that the defendant, who was the occupier of the adjacent building, by his servant, knew of its condition before the accident and could have taken steps to repair it. There was no conclusive evidence that the grating had been there when the street was dedicated. The county court judge held that the action should be dismissed, since the grating was part of the surface of the highway and the local authority was responsible for its repair, and that section 35 (1) of the Public Health Acts Amendment Act, 1890, gave no cause of action. He assessed damages at £25.

The appeal by the plaintiff was argued on the basis that the grating did form part of the dedicated highway.

Hugh Griffiths for the plaintiff. It is clear from *Robbins* v. *Jones*[2] that liability for nuisance can rest upon the owner of a grating in this kind of case, and this is further borne out by section 35 (1) of the Public Health Acts Amendment Act, 1890, which puts him under a duty to repair. The defendant in this case, in breach of that duty, allowed the grating to fall into a dangerous condition, and as a result it became a nuisance on the highway. Since the plaintiff has suffered injuries by reason of the nuisance, she is entitled to damages. The grating in question falls within section 35 (1) of the Act, and, as the defendant is the occupier of the house to which the grating belongs, the burden to repair lies upon him. There is no reason for the existence of

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[2] (1863) 15 C.B.N.S. 221.

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Gwalter.

the grating other than to cover the small area which admits light to the defendant's cellar. These contentions are supported by *Penney* v. *Berry*[3]; *Pretty* v. *Bickmore*[4]; *Horridge* v. *Makinson*[5]; *Russell* v. *Men of Devon*[6] and *Fisher* v. *Prowse.*[7] It is immaterial in this case whether the highway has been dedicated or not, since control of the grating is with the defendant, and that is sufficient to found an action for damages caused by nuisance. The real test is whether the person liable for the nuisance has the power and duty to control the grating. As that power and duty is clearly with the defendant, he is liable to compensate the plaintiff in damages for her injuries.

Raymond Kidwell for the defendant. If the grating in question does not form part of the dedicated highway it is agreed that the defendant would be liable. However, as the grating was in position at the time when the highway was dedicated and is fixed to the highway, it is part of the highway and as such is vested in the local authority under section 149 of the Public Health Act, 1875. The gratings and other matters referred to in section 35 (1) of the Public Health Acts Amendment Act of 1890 comprised only uses where the gratings were not a dedicated part of the highway and therefore not vested in the local authority. If, however, the section does apply to a dedicated object, the plaintiff is still not entitled to succeed, since he must sue upon the statute; as the section in question is not one the breach of which would give rise to a remedy, the plaintiff would be bound to introduce "a middle term," namely, the concept of control, between the statute and the liability. That is quite illogical. [Reference was made to *Cowley* v. *Newmarket Local Board*[8]; *Hamilton* v. *St. George, Hanover Square*[9]; *Solomons* v. *R. Gertzenstein Ltd.*[10]; *Swain* v. *Southern Railway*[11]; *M'Kinnon* v. *Penson*[12]; *Rundle* v. *Hearle.*[13]]

Cur. adv. vult.

December 19. Lord Evershed M.R. I will ask Ormerod L.J. to read the first judgment.

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[3] [1955] 1 W.L.R. 1021; [1955] 3 All E.R. 182.

[4] (1873) L.R. 8 C.P. 401.

[5] (1915) 84 L.J.K.B. 1294; 31 T.L.R. 389.

[6] (1788) 2 Term Rep. 667.

[7] (1862) 2 B. & S. 770.

[8] [1892] A.C. 345; 8 T.L.R. 788.

[9] (1873) L.R. 9 Q.B. 42.

[10] [1954] 2 Q.B. 243; [1954] 3 W.L.R. 317; [1954] 2 All E.R. 625.

[11] [1939] 2 K.B. 560; 55 T.L.R. 805; [1939] 2 All E.R. 794.

[12] (1853) 8 Ex.Rep. 319.

[13] [1898] 2 Q.B. 83; 14 T.L.R. 440.

Ormerod L.J. This is an appeal from an order of His Honour Judge Glazebrook given on July 10, 1957, at Gravesend County Court dismissing an action by the plaintiff against the defendant for damages for personal injuries arising from the breach of duty of the defendant. The plaintiff is an infant aged 12. On October 27, 1956, she was walking along the pavement in Clarence Street, Gravesend, when her left leg went through an iron grating which was old and in bad condition. It appeared that one of the bars had broken and fallen into the area below the grating. The judge found that the grating was a dangerous trap to passers-by and that the defendant, who was the owner and occupier of the adjacent building, by his servant Mrs. Jones, knew of its condition before the accident and could have taken steps to repair it. The grating was fixed into the pavement and was 2 ft. 6 ins. by 18 ins. It covered a small open area and its purpose was to provide light for the cellar window of the defendant's premises. There was no conclusive evidence available whether the grating was there when the street was dedicated, but the surveyor who was called said that the local authority would not now accept dedication of a street containing such a grating. The judge said: "It seems clear that if the grid, or some "predecessor, was put there by the owner of the adjacent property, it must have been done before dedication because there "was no person to do it afterwards"; and this appeal has been argued on the basis that the grid was there at the time of dedication. The county court judge held that the defendant was under no liability to the plaintiff either under statute or at common law.

The questions for this court are whether the defendant was under any duty to repair the grating and, if so, whether by reason of his failure to perform this duty a nuisance had been created upon the highway causing injury to the plaintiff for which the defendant could be made liable in damages.

Mr. Griffiths, on behalf of the plaintiff, argued that the defendant was under a duty to repair the grating by virtue of section 35 (1) of the Public Health Acts Amendment Act, 1890. He submitted that the defendant, in breach of the duty, had allowed the grating to fall into so dangerous a condition as to cause it to become a nuisance upon the highway, and that, the plaintiff having suffered injuries by reason of the nuisance, the defendant was liable to compensate her in damages.

[His Lordship read section 35 (1) and continued:] It should be noted that section 35 (2) provides that where default is made in complying with the provisions of the section, the urban authority may, after notice, do the necessary work and recover the cost from the owner or occupier. It was argued that the grating in question came within the meaning of section 35 (1) and that the defendant was the occupier of the house or building to which the grating belonged, there being no reason for the existence of the grating other than to cover the small area which admitted light to the cellar of the defendant's premises. We were referred to a number of authorities in support of this submission. I propose to mention three of them. *Penney* v. *Berry* [1] was a case where the defendant was the owner of premises adjoining the highway, and in the surface of the pavement was an opening into his cellar covered by a metal slab set in a large flagstone. In about 1950 the local authority raised the level of the pavement and so reconstructed it that the metal cover had a concrete surround and rested in a rebate in the concrete. Unfortunately, it was so constructed that one side of the cover was three-quarters of an inch higher than the pavement, with the result that in January, 1953, the plaintiff tripped on the cover and was injured. It was held that she was not entitled to recover from the defendant. Parker L.J. said [2]: " . . . the general " principle, as I understand it, is that there can be no duty on " the owner of land adjoining the highway where the nuisance is, " to abate the nuisance because the liability is, primarily at any " rate, on the local authority, and unless he has some statutory " power to do so the owner has no right to go onto the pavement " to abate the nuisance. As Shearman J. put it in *Horridge* v. " *Makinson* [3]: 'In my opinion the cases shew that a liability is " 'cast upon the owner of the house, in respect of a nuisance, " 'only when such owner has a duty to abate the nuisance, and " 'he fails to do so.' I think I might add that it is only when " such owner has a duty and a power to abate the nuisance." Parker L.J. then referred to the section and said [4]: " It is quite " clear, therefore, there was an obligation on the defendant to " keep this slab . . . in good condition and repair." He went on to say [5]: " To my mind the only question in this case is what " those words 'in good condition and repair' are apt to include." He then discussed why, in his view, there was no breach of duty on the part of the defendant. This case was relied on by the plaintiff as establishing that there was a duty on the defendant to keep the slab in repair and, at least by inference, that if as a result of the defendant's breach the slab fell into disrepair, the defendant would be responsible for any injury thereby caused.

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[1] [1955] 1 W.L.R. 1021; [1955] 3 All E.R. 182.

[2] [1955] 1 W.L.R. 1021, 1023.

[3] (1915) 84 L.J.K.B. 1294, 1296; 31 T.L.R. 389.

[4] [1955] 1 W.L.R. 1021, 1024.

[5] Ibid.

Russell v. *Men of Devon*[6] was a case where the inhabitants of a county were sought to be made liable for injury caused to an individual in consequence of a county bridge being out of repair. Lord Kenyon C.J. held that such an action could not be maintained, but said[7]: "Many of the principles laid down by the "plaintiff's counsel cannot be controverted, as that an action "would lie by an individual for an injury which he has sustained "against any other individual who is bound to repair."

The principle that an individual cannot recover damages in respect of an injury arising from the default of the public in its duty to repair a highway remains today in the doctrine that a local authority cannot be made liable for injury to an individual arising from nonfeasance in the repair of the highway. This would appear to be because the various statutes passed in the nineteenth century putting the liability to repair on surveyors and local authorities were regarded merely as a means of getting the repairs done and not as intending to create any new right of action: see Lord Halsbury L.C. in *Cowley* v. *Newmarket Local Board*.[8]

In *Pretty* v. *Bickmore*[9] an aperture covered by an iron plate was out of repair so that a passer-by was injured. The question at issue was whether the landlord or the tenant was liable to the plaintiff in view of the terms of the demise, but in the course of his judgment Bovill C.J. said[10]: "The person who is in posses-"sion of the premises and who allows the coal plate to be in a "dangerous condition is the person responsible to the public for "any injury from its being out of repair."

On behalf of the defendant, Mr. Kidwell agreed that if the grating in question did not form part of the dedicated highway the defendant would be liable. But his submission was that as the grating was in position at the time the highway was dedicated and was fixed to the highway it was part of the highway and became vested in the local authority by reason of the Public Health Act, 1875, s. 149, which provides that all streets being, or which at any time become, highways repairable by the inhabitants at large shall vest in and be under the control of the urban authority. He argued, in the first place, that the gratings and other matters referred to in section 35 of the Act of 1890 comprised only cases where the gratings, etc., were not a dedicated part of the highway and therefore not vested in the local authority. For my part, I cannot accept this submission. The section refers in the first place to "all vaults, arches, and cellars "under any street"—matters which would be unlikely to be the subject of dedication—"and all openings into such vaults," etc., and then goes on to refer to "all cellar heads, gratings," etc. There is no restriction to cellar heads, etc., which do not form part of a dedicated highway. Mr. Kidwell sought to draw support for his argument from the words "shall be kept in good condition "by the owners or occupiers of the same or of the house and "building to which the same respectively belong." He submitted that the word "belong" was ambiguous in its meaning, but that it must carry an element of proprietary interest. I think the meaning of the words is plain. The section refers to certain structures which are either under the street or in the surface of the street, and in my view its intention is to throw on to the owners or occupiers of these structures, or on the owners or occupiers of the adjoining buildings, the duty of keeping them in repair whether they have been the subject of dedication or not. A grating such as the one in question belongs to the adjoining house or building in the sense that it came into existence and has continued to exist for the sole purpose of providing access of light to the cellar of that house or building, and therefore the duty to repair it falls on the defendant. It was argued that as the grating was part of the highway it was vested in the local authority and, therefore, the effect of section 35 was to throw on to the authority the duty of repairing it, and that this pointed strongly to the construction that the subsection was referring only to structures which had not been the subject of dedication. But for my part, on reading the section as a whole, I have no doubt that the view I have already expressed is the right one.

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[6] (1788) 2 Term Rep. 667.

[7] Ibid. 671.

[8] [1892] A.C. 345, 350; 8 T.L.R. 788.

[9] (1873) L.R. 8 C.P. 401.

[10] Ibid.

It was further submitted on behalf of the defendant that, assuming the section applies to a dedicated object, the plaintiff is still not entitled to succeed. Mr. Kidwell argued that the plaintiff must sue on the statute and that, as the section in question was not one the breach of which would give rise to a remedy, the plaintiff was bound to introduce what he called a "middle term," the concept of control, between the statute and liability. He argued that this was not a logical thing to do. The question whether a breach of the duty imposed by the section would give rise to a remedy was not argued before us, although Mr. Griffiths wished to keep the point open. I fail to see what is illogical in introducing what Mr. Kidwell called a middle term. The position is that there was a structure on the highway, and it was the duty of the defendant to keep it in repair. Whether that duty arose by statute or from any other circumstance does not appear to be relevant. The defendant having failed in his duty, the structure fell out of repair and became dangerous to passers-by and thereby became a nuisance on the highway. As a result of that nuisance the plaintiff was injured. I see no reason why, in these circumstances, she cannot recover damages from the defendant. It is true that if the duty to repair was on the local authority she would not have been able to recover unless she could show that the nuisance was due to misfeasance. But it is not suggested here that the defendant is in any sense the successor of the inhabitants at large so as to be able to claim the protection of the rule as to nonfeasance. Lord Kenyon C.J. in *Russell* v. *Men of Devon*[11] regarded as incontrovertible the principle that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair, and, in my judgment, there are no circumstances in this case to give rise to a different conclusion.

For these reasons, I would allow the appeal and enter judgment for the plaintiff in the sum of damages assessed by the county court judge.

Romer L.J. I have had the advantage of reading in advance the judgment which Ormerod L.J. has given, and I so fully concur in that judgment, both in the reasoning and its conclusions, that there is nothing I desire to add.

Lord Evershed M.R. I likewise have had the advantage of seeing the judgment of Ormerod L.J. in advance, and, like Romer L.J., I feel that any addition I might make to the reasoning of it would be mere surplusage on my part. In confining myself, therefore, to that expression of agreement, I shall not, I hope, be thought to be disrespectful of the county court judge with whom we are disagreeing, or to the cogent and attractive argument of Mr. Kidwell.

Appeal allowed.

Solicitors: *Church, Bruce & Hawkes, Gravesend; Tolhursts, Gravesend.*

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[11] 2 Term Rep. 667.

C. C. A.

1959
Mar. 9, 23.

Lord Parker C.J.,
Devlin,
Donovan,
McNair and
Hinchcliffe JJ.

REGINA *v.* COOK.

Criminal Law — Evidence — Character — Imputation on character of witnesses for prosecution — Confession — Accused's allegation that statements obtained by police by threats—Cross-examination as to previous convictions—Defendant appearing in person—Need for warning by prosecution or judge—Judge's discretion—Failure to exercise discretion—Whether miscarriage of justice—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*) (ii).

The appellant was charged with obtaining a motor-car by false pretences and with receiving five banker's cheque forms knowing them to have been stolen. The prosecution led evidence by a police officer of an oral and a written statement made by the appellant. The appellant, who conducted his case in person, said several times that the statements were obtained from him by means of a threat that if he did not speak his wife would be charged. Counsel for the prosecution thereupon said that he wished to put "certain "further questions," and the chairman said that counsel was strictly entitled to do so, although he (the chairman) would have thought it unnecessary. Counsel then elicited in cross-examination that the appellant had a long record of crime. The appellant was convicted on both counts, and appealed on the ground that his cross-examination on previous convictions was improper, in that he had not conducted his defence so as to involve an imputation on the character of the police officer within the meaning of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898.[1] Alternatively, if there had been such an imputation, no warning had been given to the appellant that he was going too far, and the chairman should, in his discretion, have refused to allow the cross-examination:—

Held, (1) that the words of section 1 (*f*) (ii) of the Act of 1898 should be given their natural and ordinary meaning; and that the trial judge should, in his discretion, do what was necessary in the circumstances to protect the accused person from an application of the subsection that would be too severe.

Rex v. *Hudson* [1912] 2 K.B. 464; 28 T.L.R. 459; 7 Cr.App.R. 256 and *Rex* v. *Jenkins* (1945) 31 Cr.App.R. 1 applied.

(2) That, in the present case, the defence was so conducted as to involve an imputation on the character of the police officer, within the meaning of the subsection; that it was not clear that the chairman had exercised his discretion whether to permit the cross-examination, and it was therefore for the court to exercise its own

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[1] Criminal Evidence Act, 1898, s. 1 (*f*): "A person charged and "called as a witness in pursuance of "this Act shall not be asked, and if "asked shall not be required to "answer, any question tending to "show that he has committed or been "convicted of . . . any offence other "than that wherewith he is then "charged, . . . unless . . . (ii) . . . "the nature or conduct of the de-"fence is such as to involve impu-"tations on the character of the "prosecutor or the witnesses for the "prosecution; . . ."

discretion; that in the circumstances the questions should not have been put without a warning to the defence; but that there had been no miscarriage of justice, and, applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907, the appeal would be dismissed.

Per curiam. The attempt to give the words of the subsection a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion, and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words in favour of the defence. Cases of rape may be sui generis in this respect.

APPEAL against conviction and sentence.

The appellant, Albert Samuel John Cook, was convicted at Somerset Quarter Sessions (chairman: Judge A. H. Armstrong) of obtaining a motor-car by false pretences, for which he was sentenced to four years' imprisonment. He was convicted upon another count of the same indictment of receiving five banker's cheque forms knowing them to have been stolen, and for this offence he was sentenced to three years' imprisonment, to run concurrently with the first sentence.

The facts are stated in the judgment.

N. R. Blaker for the appellant. The appellant said that the statements were obtained from him by means of a threat that if he did not speak, his wife would be charged; the suggestion made was that the police officer was guilty of most improper conduct, but it was not an attack of the sort which puts the defendant's character in issue. It was not an attack which went to the root of the witness's integrity, like a charge of fabrication. There have been many cases in which it has been held that certain attacks on a witness are not imputations on his character within the meaning of subsection (*f*) (ii). Thus, a statement in cross-examination in *Rex* v. *Rouse* [2] that the prosecutor was a liar was held only to be an emphatic denial of the truth of the charge; so also in *Rex* v. *Grout*.[3] In *Rex* v. *Turner* [4] an emphatic and detailed allegation of consent in a prosecution for rape was held not to put character in issue. *Rex* v. *Turner* [5] was approved in *Stirland* v. *Director of Public Prosecutions*.[6] If the proper conduct of the defence involves injurious imputations on witnesses for the prosecution, the defendant's character is not thereby put in issue. [Reference was made to *O'Hara* v. *H.M. Advocate*.[7]]

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[2] [1904] 1 K.B. 184; 20 T.L.R. 68.

[3] (1909) 26 T.L.R. 60; 3 Cr.App. R. 64.

[4] [1944] K.B. 463; 60 T.L.R. 332; 30 Cr.App.R. 9; [1944] 1 All E.R. 599.

[5] [1944] K.B. 463.

[6] [1944] A.C. 315; 60 T.L.R. 461; 30 Cr.App.R. 40; [1944] 2 All E.R. 13.

The principle that the attack may be necessary to the proper conduct of the defence is shown in the "rape cases," for example, in *Rex* v. *Sheean*.[8] It is not confined to these: *Rex* v. *Preston*.[9] Thus, in *Rex* v. *Westfall*[10] a statement that a police officer assaulted the defendant did not render questions as to character admissible, and so also in *Rex* v. *Bridgwater*,[11] where it was alleged that a police officer had employed the defendant as an informer. [Reference was made to *Rex* v. *Biggin*,[12] *Rex* v. *Murray*,[13] *Reg.* v. *Thompson*[14] and *Reg.* v. *Marshall*.[15]] *Rex* v. *Hudson*[16] is a different case, for there the defendant accused a prosecution witness of committing the crime with which he was charged. *Reg.* v. *Clark*[17] was a case of an attack on the character of a police officer of a most fundamental sort, going to the root of his integrity; it was suggested that he composed the confession alleged to have been made by the accused. So also in *Rex* v. *Jones*.[18] Here the attack was not pointed directly against the officer but against the police generally. It was not elaborated or pressed and, although repeated, it may be that the prisoner is simply a man who often repeats himself.

The judge never exercised his discretion in allowing the cross-examination. He simply said that counsel for the prosecution was strictly entitled to ask the questions. The judge has a discretion which must be exercised: *Maxwell* v. *Director of Public Prosecutions*[19] and *Stirland* v. *Director of Public Prosecutions*.[20] In *Rex* v. *Jenkins*[21] it was held that the judge must decide whether the cross-examination "is fraught with results which "immeasurably outweigh the result of questions put by the "defence and which make a fair trial of the accused person "almost impossible."

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[7] 1948 S.C.(J.) 90.

[8] (1908) 24 T.L.R. 459.

[9] [1909] 1 K.B. 568; 25 T.L.R. 280; 2 Cr.App.R. 24.

[10] (1912) 28 T.L.R. 297; 7 Cr.App.R. 176.

[11] [1905] 1 K.B. 131; 21 T.L.R. 69.

[12] [1920] 1 K.B. 213; 36 T.L.R. 17; 14 Cr.App.R. 87.

[13] [1951] 1 K.B. 391; 66 T.L.R. (Pt. 2) 1007; 34 Cr.App.R. 203; [1950] 2 All E.R. 925.

[14] [1893] 2 Q.B. 12; 9 T.L.R. 435.

[15] (1899) 63 J.P. 36.

[16] [1912] 2 K.B. 464, 470; 28 T.L.R. 459; 7 Cr.App.R. 256.

[17] [1955] 2 Q.B. 469; [1955] 3 W.L.R. 313; 39 Cr.App.R. 120; [1955] 3 All E.R. 29.

[18] (1923) 39 T.L.R. 457; 17 Cr.App.R. 117.

[19] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152.

[20] [1944] A.C. 315.

[21] (1945) 31 Cr.App.R. 1.

It is the invariable practice to give warning when the prosecution intend to exercise their rights under the subsection. Here there was no warning, and that is particularly regrettable where the defendant, as here, was not represented.

J. H. Inskip for the Crown. This is a case in which there was a plain imputation on the character of the police officer. The case is covered by the decisions in *Rex* v. *Jones* [22] and *Reg.* v. *Clark.*[23] In *Rex* v. *Wright* [24] there was an allegation by the defendant that he had been bribed to make the confession; although that was not an allegation of something in the nature of fabrication, questions as to character were held to be properly put; so also in *Rex* v. *Dunkley.*[25] In *Rex* v. *Rappolt* [26] the emphatic repetition of an allegation that a prosecution witness was a liar was held to put the defendant's character in issue. [Reference was made to *Reg.* v. *Cunningham.*[27]]

With regard to the failure to warn the defendant, in many cases a defendant who is not represented by counsel is given greater indulgence. But in this case the defendant refused an offer of legal aid and conducted his own case with skill, making use of legal textbooks.

Blaker replied.

Cur. adv. vult.

[The judgment is reported solely upon the appeal against conviction.]

March 23. DEVLIN J. read the following judgment of the court: On September 26, 1958, the appellant was sentenced at Somerset Quarter Sessions to a term of four years' imprisonment for obtaining a motor-car by false pretences, and to a term of three years concurrent for receiving five banker's cheque forms knowing them to have been stolen. On March 9 this court heard his appeal against conviction and sentence and dismissed it. There is only one point in the appeal that deserves serious consideration, and that is the contention that the appellant was improperly cross-examined about his previous convictions.

The facts that are relevant to it can be shortly stated. On July 9, 1958, the premises of Ackland & Pratten Ltd. were broken into and among the property missing were five cheque forms. On July 25, a Mr. Long, who lives at Nailsea near Bristol, advertised a Humber Hawk motor-car for sale. On July 28 he was rung up by a woman who said that she was Mrs. Pratten and who arranged to buy the car. The appellant's wife was joined with him in the indictment, and it appears that the case for the prosecution against her was that she falsely pretended to be Mrs. Pratten. Separate trials were ordered and we are concerned only with the case against the appellant. Later, on July 28, the appellant telephoned Long to say that he was bringing round a cheque from Mrs. Pratten and would collect the car. The appellant came and represented himself to be an employee of Ackland & Pratten, a concern well known to Long. Long let him take away the car in exchange for a cheque for £430, signed G. E. Pratten. The cheque was on one of the stolen forms and the signature on it was fictitious.

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[22] 39 T.L.R. 457.

[23] [1955] 2 Q.B. 469.

[24] (1910) 5 Cr.App.R. 131.

[25] [1927] 1 K.B. 323; 19 Cr.App.R. 78.

[26] (1911) 6 Cr.App.R. 156.

[27] [1959] 1 Q.B. 288; [1959] 2 W.L.R. 63; [1958] 3 All E.R. 711.

The witnesses for the prosecution included a Detective-Constable Thomas, who gave evidence that on August 3, when the appellant was charged, he said that he made out the cheque himself, and admitted that he had got the car on a "dud" cheque. Later the appellant made a statement in writing in which he said that he found the cheque book in the road, dumped down by the side of the wall. The appellant conducted his case in person; and in the course of his cross-examination of the police officer he suggested that the statements had been obtained from him by means of a threat that if he did not speak his wife would be charged; this suggestion was denied. The appellant later gave evidence on his own behalf, and in answer to questions in cross-examination about his statements to the police he again said that he had made them under the threat that his wife would be charged. Upon that, counsel for the prosecution indicated that he wished to put "certain further questions." The chairman said that while counsel was strictly entitled to do so, he would have thought it would not be necessary. Counsel then put to the appellant, and the appellant agreed, that he had a long record of crime behind him; details of various convictions for offences of dishonesty were then put. In the circumstances of this case and under the provisions of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898, those questions were permissible only if the nature or conduct of the defence was such as to involve imputations on the character of Detective-Constable Thomas.

It is clear from the subsection as a whole that it does not intend that the introduction of a prisoner's previous convictions

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should be other than exceptional. The difficulty about its phraseology is that unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character; a prisoner charged with assault could not assert that the prosecutor struck first without imputing to him a similar crime. The authorities show that this court has endeavoured to surmount this difficulty in two ways. First, it has in a number of cases construed the words of the subsection as benevolently as possible in favour of the accused. Secondly, it has laid it down that, in cases which fall within the subsection, the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution's witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence.

The judgments in many of the earlier cases are based upon a limited construction of the statute. Thus, in *Rex* v. *Rouse*[1] it was held that a statement by the prisoner in cross-examination that the prosecutor was a liar must be regarded only as an emphatic denial of the truth of the charge against him and did not enable the prosecution to put his character in issue. Cases of rape have given rise to a peculiar difficulty; the prisoner cannot assert that the connection was with the consent of the prosecutrix without making imputations against her chastity. There was for a long time a difference of opinion about the effect of this; it was not definitely settled in favour of the defence until *Rex* v. *Turner*,[2] a case which was shortly after approved by the House of Lords in *Stirland* v. *Director of Public Prosecutions*.[3] At the same time this court has refused as a general rule to read words into the section that are not there. This was plainly laid down by a full court in *Rex* v. *Hudson*[4] in the following terms: "We think that the words of the section, "'unless . . . the nature or conduct of the defence is such as "'to involve imputations,' etc., must receive their ordinary and "natural interpretation, and that it is not legitimate to qualify

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[1] [1904] 1 K.B. 184; 20 T.L.R. 68.

[2] [1944] K.B. 463; 60 T.L.R. 332; 30 Cr.App.R. 9; [1944] 1 All E.R. 599.

[3] [1944] A.C. 315; 60 T.L.R. 461; 30 Cr.App.R. 40; [1944] 2 All E.R. 13.

[4] [1912] 2 K.B. 464, 470; 28 T.L.R. 459; 7 Cr.App.R. 256, 262.

"them by adding or inserting the words 'unnecessarily' or "'unjustifiably' or 'for purposes other than that of developing "'the defence,' or other similar words."

We need not go through the cases in detail. They were all carefully reviewed in the Scottish case of *O'Hara* v. *H.M. Advocate*,[5] and the effect of them is succinctly stated by the Lord Justice-Clerk as follows[6]: "The net result seems to be that "the Court of Criminal Appeal in England adheres to *Hudson* "with certain modifications in cases of rape and subject to the "discretionary power of the presiding judge." Since then *Rex* v. *Hudson*[7] has been again applied by this court in *Reg.* v. *Clark*.[8]

The alternative approach to the problem has been by the application of the general rule that the trial judge must always exercise his discretion so as to prevent the introduction of material whose prejudicial effect would outweigh its evidential value. The point that under this subsection the judge had a discretion was first made by Lord Sankey L.C. in *Maxwell* v. *Director of Public Prosecutions*.[9] It was made again by Lord Simon L.C. in *Stirland* v. *Director of Public Prosecutions*.[10] The principle was first elaborated in *Rex* v. *Jenkins*.[11] In that case this court reaffirmed *Rex* v. *Hudson*[12] and then dealt with the question of discretion. Singleton J. said[13]: "The subsection "was intended to be a protection to an accused person. A case "ought to be tried on its own facts and it has always been "recognised that it is better that the jury should know nothing "about an accused person's past history if that is to his discredit. Just as it was recognised by the legislature that this "was fair and proper, so it was recognised that if the nature "or conduct of the defence was such as to involve imputations "on the character of the prosecutor or the witnesses for the "prosecution, it was equally fair and proper that counsel for "the prosecution should have the right to ask questions tending "to show that the accused person has committed or been convicted of an offence other than that which is under investigation. If and when such a situation arises, it is open to counsel "to apply to the presiding judge that he may be allowed to take "the course indicated, as was done in this case. Such an

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[5] 1948 S.C.(J.) 90.

[6] Ibid. 97.

[7] [1912] 2 K.B. 464.

[8] [1955] 2 Q.B. 469, 474; [1955] 3 W.L.R. 313; 39 Cr.App.R. 120; [1955] 3 All E.R. 29.

[9] [1935] A.C. 309; 50 T.L.R. 499; 24 Cr.App.R. 152.

[10] [1944] A.C. 315, 324.

[11] (1945) 31 Cr.App.R. 1.

[12] [1912] 2 K.B. 464.

[13] 31 Cr.App.R. 1, 14.

"application will not always be granted, for the judge has a "discretion in the matter. He may feel that even though the "position is established in law, still the putting of such questions "as to the character of the accused person may be fraught with "results which immeasurably outweigh the result of questions "put by the defence and which make a fair trial of the accused "person almost impossible. On the other hand, in the ordinary "and normal case he may feel that if the credit of the prosecutor "or his witnesses has been attacked, it is only fair that the jury "should have before them material on which they can form their "judgment whether the accused person is any more worthy to "be believed than those he has attacked. It is obviously unfair "that the jury should be left in the dark about an accused "person's character if the conduct of his defence has attacked "the character of the prosecutor or the witnesses for the prosecu-"tion within the meaning of the section. The essential thing "is a fair trial and that the legislature sought to ensure by "section 1 (*f*)."

In our opinion the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in *Rex* v. *Hudson* [14] as applied in *Rex* v. *Jenkins*.[15] The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the subsection in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should, in his discretion, do what is necessary in the circumstances to protect the prisoner from an application of the subsection that would be too severe. It may be that, as indicated in *O'Hara* v. *H.M. Advocate*,[16] cases of rape should be regarded as sui generis; certainly the peculiar questions to which they give rise have been settled by *Rex* v. *Turner* [17] and that case has determined how the discretion should be exercised. No equally clear guidance can be given in cases where the subject-matter is not so specialised. In particular, no firm rule has been, or can be, laid down to govern the sort of circumstances we have to consider here where the defence involves a suggestion of impropriety against a police officer. The

[14] [1912] 2 K.B. 464.

[15] (1945) 31 Cr.App.R. 1.

[16] 1948 S.C.(J.) 90.

[17] [1944] K.B. 463.

cases on this subject-matter—in particular *Rex* v. *Preston*,[18] *Rex* v. *Jones*[19] and *Reg.* v. *Clark*[20]—indicate the factors to be borne in mind and the sort of question that a judge should ask himself. Is a deliberate attack being made upon the conduct of the police officer calculated to discredit him wholly as a witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence. If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then, as Singleton J. put it in *Rex* v. *Jenkins*[21] and Lord Goddard C.J. repeated in *Rex* v. *Clark*,[22] the jury is entitled to know the credit of the man on whose word the witness's character is being impugned.

We now apply these principles to the circumstances of this case. In our judgment, when the prosecution's evidence of an admission made to a police officer is met by saying that it was extorted by means of a threat that otherwise the prisoner's wife would be charged, the defence is so conducted as to involve an imputation on the character of the police officer. The issue, therefore, becomes one of discretion. It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision. But in this case we are not satisfied that the learned chairman really exercised his discretion at all. He allowed the questions to be put because he thought that counsel was strictly entitled to do so, although he, the chairman, queried whether it was necessary. Accordingly, it falls to us to exercise our own discretion in the matter.

Mr. Blaker did not dispute that the conduct imputed to the police officer was grossly improper, but he submitted that it was not like a charge of fabrication or concoction which goes to the root of a witness's integrity and which, if accepted, destroys the whole of his evidence on every point in the case. He submitted also that the attack was not pointedly directed against the witness under cross-examination, but was made against the police generally. The charge was not elaborated or pressed; it was repeated several times, but that was probably because the prisoner is a man who often repeats himself. Finally, Mr. Blaker made the substantial point that no warning was given to the accused before his convictions were put to him. In cases of this sort where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection, or for the judge to give the defence a caution. This is especially needful when the prisoner, as here, was not represented, though it is fair to say that he professed familiarity with the law and rejected the legal aid that had been assigned to him. We have come to the conclusion that the questions ought not to have been put.

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[18] [1909] 1 K.B. 568; 25 T.L.R. 280; 2 Cr.App.R. 24.

[19] (1923) 39 T.L.R. 457; 17 Cr. App.R. 117.

[20] [1955] 2 Q.B. 469.

[21] (1945) 31 Cr.App.R. 1.

[22] [1955] 2 Q.B. 469, 479.

It is not often in this type of case that the proviso to section 4 (1) of the Criminal Appeal Act, 1907, can properly be applied. But here, in our judgment, the case against the appellant is overwhelming. The evidence for the prosecution called for some reasonable explanation by him about how he came to be in possession of the cheque forms and to use one with a fictitious signature on it. The prisoner's story was that a motor dealer called Todd, who had died just before the trial took place, offered him a car for £300. The appellant agreed to buy the car; he had only got £165 but proposed to collect the balance off his mates in the morning. Todd then told the appellant to collect the car from Long, and for this purpose gave him the cheque signed in the name of Pratten for £430; this meant that Todd would have been losing £130 on the transaction. No one in his senses could believe a story of this sort. Apart from all its inherent improbability, it was quite inconsistent with the statements made by the appellant to Detective-Constable Thomas. Finally, we may add that the learned chairman gave to the jury a proper direction about the limited effect of the appellant's bad character.

Although we think that the chairman in his discretion should have refused to allow the appellant to be cross-examined as to his previous convictions, we are satisfied that the only reasonable and proper verdict on the facts was one of guilty, and that there has been no miscarriage of justice. It is for that reason that we dismissed the appeal.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Stileman, Neate & Topping for Fryer, Bennett & Deal, Weston-super-Mare.*

J. D. P.

C. C. A.

1959
March 23.

Lord Parker C.J., Streatfeild and Hinchcliffe JJ.

REGINA *v.* OAKES.

Statute — Construction — Absurdity — Avoiding unintelligible result — Jurisdiction of court to amend Act by reading "or" for "and"— Meaning of "or" and "and"—Construction of criminal Act against subject—Official Secrets Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 75), *s.* 7.

Official Secrets—Act preparatory to commission of offence—Construction of statute—Meaning of "or" and "and"—Official Secrets Act, 1920, *s.* 7.

By section 7 of the Official Secrets Act, 1920: "Any person "who . . . aids or abets and does any act preparatory to the com-"mission of an offence under the principal Act or this Act, shall "be guilty of a felony . . ."

The appellant was charged with doing an act preparatory to the commission of an offence against section 1 (1) (*c*) of the Official Secrets Act, 1911, contrary to section 7 of the Official Secrets Act, 1920.[1] His contention that section 7 disclosed no offence known to the law was overruled and he then pleaded Guilty and was sentenced to two years' imprisonment. He appealed:—

Held, that although, where the literal meaning of a penal statute produced an intelligible result, there was no ground for reading in words, or changing words, according to what might be the supposed intention of Parliament; in the present case, because of the use of the word "and" after the word "abets" in section 7, no intelligible meaning could be given to the section, but it being clear what the intention was, and there having been merely a faultiness of expression, the court would read "or" for "and" and dismiss the appeal.

Dicta in *Attorney-General* v. *Beauchamp* [1920] 1 K.B. 650, 655, 657, 658 applied.

Appeal against conviction.

On November 20, 1958, the appellant, Robert Nelson Embleton Oakes, was charged at Surrey Assizes on an indictment containing four counts. The first count charged him with stealing official documents, to which he pleaded Not Guilty and was acquitted. The second and third counts charged him with retaining a document and communicating a document contrary to section 2 (1) (*b*) and (*a*) respectively of the Official Secrets Act, 1911, to both of which he pleaded Guilty.

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[1] Official Secrets Act, 1920, s. 7: "Any person who attempts to commit "any offence under the principal Act "or this Act, or solicits or incites or "endeavours to persuade another per-"son to commit an offence, or aids or "abets and does any act preparatory "to the commission of an offence "under the principal Act or this Act, "shall be guilty of a felony or a "misdemeanour or a summary "offence according as the offence in "question is a felony, a misdemean-"our or a summary offence, . . ."

By the fourth count he was charged: " That you, on July 4, " 1958, in this county, did an act preparatory to communicating " to another person, for a purpose prejudicial to the safety or " interests of the State, documents calculated to be of use to an " enemy by entering into an arrangement with one Warner where-" by the said Warner was to secure a purchaser for certain docu-" ments used in a prohibited place and in the possession of you, " the said Oakes."

Before the appellant pleaded to the fourth count his counsel moved to quash the count on the ground that it disclosed no offence known to the law. Slade J., after hearing argument, overruled that submission, whereupon the appellant pleaded Guilty to this count and was sentenced to 18 months', 12 months' and two years' imprisonment on the second, third and fourth counts respectively, the sentences to run concurrently.

He appealed against his conviction on the fourth count on the ground that Slade J. misdirected himself on the true construction of section 7 of the Official Secrets Act, 1920.

Gerald Howard Q.C. and *J. S. R. Abdela* for the appellant. The word " and " where it occurs in the words " or aid or abets " and does any act preparatory to the commission of an offence " in section 7 of the Official Secrets Act, 1920, is conjunctive. Slade J. in construing the section was not entitled to alter the word " and " to " or " or to insert into the section after the word " and " the words " any person who." Read literally and in its natural meaning this section does not make an " act preparatory to " the commission of an offence " itself an offence.

In the construction of a statute, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed: *per* Lord Simonds in *Magor and St. Mellons R. D. C.* v. *Newport Corporation*,[2] and Maxwell on Interpretation of Statutes, 10th ed., p. 4. Moreover, this is a penal statute to which the general principle of strict construction of the actual words used applies: see *per* Pollock C.B. in *Attorney-General* v. *Sillem*,[3] and Maxwell, at p. 273. Despite the apparent intention of the legislature, the court in *Coe* v. *Lawrence*[4] declined to interpolate the words " any person who " into a penal

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[2] [1952] A.C. 189, 190; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[3] (1864) 33 L.J.Ex. 92, 110.

[4] (1853) 22 L.J.Q.B. 140.

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section of the Municipal Corporations Act, 1835, s. 102, in order to give effect to that apparent intention. The words of a penal section should not be construed so as to bring within it a person who does not come within its express language: *London County Council* v. *Aylesbury Dairy Co. Ltd.*[5]; *Gluchowska* v. *Tottenham Borough Council.*[6]

Sir Reginald Manningham-Buller Q.C., A.-G., Harold Brown Q.C. and *E. J. P. Cussen* for the Crown. The appellant did an "act preparatory" in that he tried to get Warner to find a purchaser for the documents. The earlier Official Secrets Acts must be looked at, and in particular the Official Secrets Act, 1889, s. 3, and the Official Secrets Act, 1911, s. 4. Moreover, by section 8 of the Accessories and Abettors Act, 1861, it is provided: "Whosoever shall aid, abet, counsel, or procure the commission "of any misdemeanour, whether the same be a misdemeanour at "common law or by virtue of any Act passed or to be passed, shall "be liable to be tried, indicted, and punished as a principal "offender"; but if the argument on behalf of the appellant is correct, in a matter involving the security of the State, the offence of aiding and abetting is limited to such aiding and abetting in which an act preparatory to the commission of an offence has taken place.

In *Reg.* v. *Eagleton,*[7] *Rex* v. *Linneker*[8] and *Rex* v. *Robinson,*[9] the court drew a distinction between acts of preparation and acts which would constitute attempts. See also regulation 48 of the Defence of the Realm (Consolidated) Regulations, 1914, regulation 28 of the Emergency Regulations, 1921, made under the Emergency Powers Act, 1920, and the Defence (General) Regulations, 1939, reg. 90 (1). These provisions expressly covered the position of a man doing an "act preparatory" to the commission of such an offence against the State. During the last war, by regulation 7 and the Schedule to the Defence (General) Regulations, 1939 (Miscellaneous Amendments), now revoked, section 7 of the Official Secrets Act, 1920, was amended by the substitution of the words "or does any act" for the words "and does any "act."

There is an ambiguity in the wording of section 7 of the Official Secrets Act, 1920. There is no reason to limit the effect of the word "and" to the immediately preceding words. Here there is a real problem of construction, a latent ambiguity: see Lord Somervell's remarks in *Attorney-General* v. *Prince Ernest Augustus of Hanover.*[10] To give effect to the intention of Parliament, either the word "and" must be read as "or" or else it must be read as governing the words "any person who," which must be read into the section immediately after that word. The language of the section can be modified in order to carry out the legislature's intention: see Maxwell on Interpretation of Statutes, 10th ed., pp. 238, 239; *Mersey Docks and Harbour Board* v. *Henderson Brothers*[11]; *Walker* v. *York Corporation*[12]; *Golden Horseshoe Estates Co. Ltd.* v. *The Crown*[13]; *Murdoch* v. *British Israel Federation*[14]; *Rex* v. *Cracknell.*[15] In war and in peace it is necessary to give effect to the intention of Parliament where there has been a faultiness of expression, even though this may mean changing the form of words used: see *Attorney-General* v. *Beauchamp.*[16]

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[5] [1898] 1 Q.B. 106.

[6] [1954] 1 Q.B. 439; [1954] 2 W.L.R. 302; [1954] 1 All E.R. 408.

[7] (1855) Dears. 376.

[8] [1906] 2 K.B. 99.

[9] [1915] 2 K.B. 342.

Gerald Howard Q.C. in reply. The Attorney-General has admitted that there is an ambiguity in the wording of section 7 and the appellant is entitled to the benefit of the doubt: *Rex* v. *Chapman.*[17] None of the cases cited by the Attorney-General in support of altering the words of the legislature were criminal cases save *Attorney-General* v. *Beauchamp,*[18] where there was no ambiguity.

LORD PARKER C.J., giving the judgment of the court, stated the facts, read section 7 of the Official Secrets Act, 1920, and continued: It is pointed out, as it was pointed out to the judge, that a number of matters are set out in section 7 which will constitute an offence. They are all separated by the disjunctive "or" until one gets to the word "abets," when instead of the sentence going on "or does any act preparatory to the commission "of an offence," the word is "and does any act." Accordingly, it is said that on its literal meaning there is not constituted under that section an offence of doing an act preparatory to the commission of an offence alone, and that being what the appellant was charged with, there is no offence alleged under the section.

The argument here is in a very short compass. Mr. Howard points out what is undoubtedly true, that the concern of the courts is to ascertain the intention of Parliament. That intention, certainly in the first instance at any rate, is to be found from the actual words used, and he quotes in support of that some very strong observations of Lord Simonds in *Magor and St. Mellons Rural District Council* v. *Newport Corporation.*[1] Mr. Howard goes further; he says that when you are looking at a penal statute, still more so when you are looking at a penal statute constituting a new offence, it is imperative on the court to look alone at the words used, and in that connection he refers to the judgment of Pollock C.B. in *Attorney-General* v. *Sillem.*[2] There Pollock C.B. said: "We have had in this country no court of criminal equity "since the Star Chamber was abolished, as Lord Campbell called "it, in a case tried before him . . . Blackstone J. well lays down "the rule: 'The freedom of our constitution will not permit that "'in criminal cases a power should be lodged in any judge to "'construe the law otherwise than according to the letter.'" A little further on in the next column he said: "If I were asked "whether there be any difference left between a criminal statute "and any other statute not creating an offence I should say that "in a criminal statute you must be quite sure that the offence "charged is within the letter of the law." Mr. Howard also refers to *Coe* v. *Lawrence.*[3] From there he goes on to contend that if you read the sentence in section 7 literally it, in fact, makes a grammatical sentence, you can give to each word a meaning, and accordingly, he says that, even if the result may be absurd, there is no ground for making any alteration in the language or reading any words into it.

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[10] [1957] A.C. 436, 473, 474; [1957] 2 W.L.R. 1, 18, 19; [1957] 1 All E.R. 49, 61, 62.

[11] (1888) 13 App.Cas. 595.

[12] [1906] 1 K.B. 724.

[13] [1911] A.C. 480.

[14] [1942] N.Z. 600.

[15] [1931] 4 D.L.R. 657.

[16] [1920] 1 K.B. 650.

[17] [1931] 2 K.B. 606.

[18] [1920] 1 K.B. 650.

The court feels that it is at that point that it is constrained to depart from Mr. Howard's argument. It seems to this court that where the literal reading of a statute, and a penal statute, produces an intelligible result, clearly there is no ground for reading in words or changing words according to what may be the supposed intention of Parliament. But here we venture to think that the result is unintelligible. Lord Coleridge in *Attorney-General* v. *Beauchamp*[4] put it quite shortly in these words: "Unquestionably, when one is construing a penal statute, the "first thing is to construe it according to the ordinary rules of "grammar, and if a construction which satisfies those rules makes "the enactment intelligible, and especially if it carries out the "obvious intention of the legislature as gathered from a general

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[1] [1952] A.C. 189, 190; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[2] (1864) 33 L.J.Ex. 92, 110.

[3] (1853) 22 L.J.Q.B. 140.

[4] [1920] 1 K.B. 650, 655.

"perusal of the whole statute, that grammatical construction "ought not to be departed from." We think that the literal construction here produces an unintelligible result, and for many reasons. In the first place, there is an obvious difficulty as to what is qualified by the words "and does any act preparatory to "the commission of an offence." Does it qualify all the alternatives that have gone before? Does it qualify only the words that have followed the last comma, namely, "or aids or abets," or does it qualify only the last word "abets"? If it qualifies all that has gone before, clearly in regard to an attempt it makes nonsense, because an act preparatory to the offence is something more remote than an act which constitutes an attempt, and, accordingly, it is meaningless in connection with attempts, and indeed it is difficult to give it a meaning with regard to solicits, incites or endeavours to persuade. If, on the other hand, it only qualifies the words "or aids or abets" or the word "abets" alone, then immediately one asks: What is the sense of it applying to those words and not to the words "solicits or incites or "endeavours to persuade." Whichever way it is read, an absurd result is obtained. Secondly, it is to be observed that, but for these words, an aider or abettor by reason of the Accessories and Abettors Act, 1861, would have committed an offence, and accordingly, if the argument is right and the literal interpretation is given it results in this, that in a matter which involves the security of the State the offence of aiding and abetting is limited to such aiding and abetting in which an act preparatory to the commission of an offence has taken place. Thirdly, it is to be observed that the conception of doing an act preparatory to the commission of an offence had been considered by the courts before the passing of the Act of 1920. As long ago as 1855 in *Reg.* v. *Eagleton*,[5] Parke B. was considering the sort of acts which would constitute an attempt, and drawing a distinction between those acts and acts which were more remote and which were merely acts of preparation. Again, in *Rex* v. *Linneker*,[6] the court was drawing a distinction between acts of preparation and acts which would constitute attempts. Also in *Rex* v. *Robinson*[7] the same distinction was drawn. Then, before *Rex* v. *Robinson*[7] in the regulations made in the First World War, the Defence of the Realm (Consolidation) Regulations, 1914, it was provided by an amendment in regulation 48: "Any person who attempts to

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[5] (1855) Dears. 376, 515.

[6] [1906] 2 K.B. 99.

[7] [1915] 2 K.B. 342.

"commit, or procures aids or abets, or does any act preparatory "to, the commission of, any act prohibited by these regulations, "or harbours any person whom he knows, or has reasonable "grounds for supposing, to have acted in contravention of these "regulations, shall be guilty of an offence against these regulations." Passing for a moment to the period after the passing of the Act of 1920, it is to be observed that by regulation 28 of the Emergency Regulations, 1921, it was again provided that "Any "person who does any act preparatory to the commission of any "act prohibited by these regulations shall be guilty of an offence." The same words appear in the Defence (General) Regulations, 1939, reg. 90 (1), in force during the last war. Everywhere, be it observed, when this sort of situation is being discussed and where enactments are made in regard to it, it is considering the doer of an act preparatory to the commission by him of an offence, and it seems to the court that that is the natural meaning of those words. If you try to read those words in that sense as a qualification of aiding and abetting, the result becomes absurd, because the essence of aiding and abetting is the aiding and abetting of someone else to commit an offence, and to say it is a qualification of that that a man should do an act preparatory to the commission of an offence by himself is pure nonsense.

Accordingly, for all those reasons it seems to this court that, read literally, no intelligible meaning can be given to this section, and accordingly, this court agrees with Slade J. The judge thought that the natural way of getting over the difficulty was to read into the Act after the word "and" and before the word "does" the opening words of the section, "Any person who," so that it would read, "or aids or abets and any person who does "any act preparatory to the commission of an offence under the "principal Act or this Act." The court, on the whole, prefers to read the word "or" for "and," because if the words "any "person who" are inserted it leaves the words "aids or abets" in the air, whereas if "and" is changed to "or" it will read in this way: "or aids or abets or does any act preparatory to," and then I insert a comma "the commission of an offence." Indeed, read in that way it happens very closely to correspond with the only two enactments near the time, namely, the regulations of 1914 and of 1921.

Mr. Howard has quite rightly pointed out that, although the court has on occasions read "and" for "or" and "or" for "and," it has with one exception been in order to produce a result more favourable to the subject. The court feels, however, that on principle there is no reason, if compelled to that end, why the words should not be changed even though the result is less favourable to the subject, and, indeed, that was done in *Attorney-General* v. *Beauchamp*.[8] In that case Rowlatt J., having referred to the manifest absurdity which would arise if a literal construction was given, said[9]: " It is not really a question of adding any-" thing to the section, for it is quite clear what the intention was, " and the omission of certain words that you would expect to find " there is nothing more than a faultiness of expression." It seems to the court that it is quite clear in the present case what the intention was, and that there has been merely a faultiness of expression. Again, McCardie J., who agreed with Rowlatt J., said at the end of his judgment[10]: " That seems to be the reason-" ably plain meaning of the section which we have to consider, " while it is in agreement with the earlier legislation on the " subject." Everything that was said by those two judges seems to this court to apply fully in the circumstances of this case. Accordingly, the court will read " or " for " and," and this appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. D. P.

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[8] [1920] 1 K.B. 650.
[9] Ibid. 657.
[10] Ibid. 658.

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

C. A.
1959
April 7, 8, 9;
May 11.

Lord Evershed M.R., Ormerod and Harman L.JJ.

Revenue—Income tax—Penalty—" Treble the tax which . . . ought to " be charged "—Bank interest misstated in income tax return—Additional assessment made—Claim for penalties—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 25 (3).

Judicial Precedent—Statute—Construction—Assumed construction in Court of Appeal and House of Lords for decision on different point—Adopted construction not binding.

The defendant, in making a return of income for the year ending April 1952, stated that interest from his Post Office Savings Bank account amounted to £18 6s., and was assessed for tax accordingly. In fact the interest was £51 5s. 9d., and when that was discovered an additional first assessment was made on the defendant for the amount understated, the tax on which was £14 5s. Subsequently, the Inland Revenue Commissioners, by writ dated June 13, 1956, claimed £438 14s. 6d. for penalties, being triple the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20, under section 25 (3) of the Income Tax Act, 1952, which provides: "A person who neglects or refuses to deliver . . . a true "and correct . . . return which he is required under the preceding "provisions of this chapter to deliver shall—(a) if proceeded "against by action in any court, forfeit the sum of £20 and treble "the tax which he ought to be charged under this Act; . . ."

On appeal by the commissioners from a decision that the triple penalty was of the difference between the amount which should have been charged and the amount which, at the date of the proceedings, had actually been charged:—

Held, (1) that the words "the tax which he ought to be "charged" in section 23 (3) meant the tax appropriate to the item or items not disclosed at a date or dates when disclosure should have been made.

(2) That a decision of the House of Lords on a different issue did not bind the Court of Appeal to accept a different construction of these words which had not been argued, but had been assumed to be correct.

Attorney-General v. *Till* [1910] A.C. 50; 26 T.L.R. 134; reversing [1909] 1 K.B. 694; 25 T.L.R. 342 considered.

Decision of Diplock J. [1959] 1 Q.B. 327; [1959] 2 W.L.R. 32; [1958] 3 All E.R. 682 varied.

Appeal from Diplock J.

The defendant, Albert Edwin Hinchy, was a civil servant employed in the Customs and Excise Department and his salary was taxable under Schedule E, tax being levied at the source under P.A.Y.E. On April 19, 1952, he filled up a form prepared for the purpose by the direction of the Inland Revenue Commissioners containing a return of income and claim for allowances for the income tax year 1952/53 in which he stated that the interest received by himself and his wife on accounts on deposits in banks, including Post Office and other savings banks, was £18 6s. His liability for tax was assessed accordingly at £125 6s. 6d. in respect of his total income. In fact the interest from his Post Office Savings Bank account for that year was £51 5s. 9d. He had made similar understatements of this interest for a number of previous years. The matter was discovered by the Inland Revenue and on November 30, 1955, an additional first assessment was made on the defendant for £139 11s. 6d., being the tax under Schedule E, plus £14 5s. which the Court of Appeal found represented the tax on the undisclosed amount of the bank interest.

On June 13, 1956, by a specially indorsed writ, the Inland Revenue Commissioners claimed a penalty in the amount of £438 14s. 6d., under section 25 (3) of the Income Tax Act, 1952,[1] being three times the total amount of tax payable by the defendant in respect of the tax year 1952/53 plus £20. Lord Evershed M.R., delivering the judgment of the court, pointed out that the basis of the claim in the writ was not in all respects consistent with the Crown's submission in the Court of Appeal. Leave was given to defend the action. Diplock J. decided that only the forfeited sum of £20 was payable, for he held that the relevant time for ascertaining the amount of the penalty (which, in his Lordship's view in a case where some charge had been made, was £20 and treble the amount of the difference between the charge which was made and that which should have been made) was the time when proceedings were brought. In the present case the defendant had at that date been charged with all the tax for which he was liable.

The commissioners appealed.

Sir Reginald Manningham-Buller A.-G., Q.C., John Pennycuick Q.C. and *Alan Orr* for the commissioners. Under section 25 (3) the Crown can proceed either before the General Commissioners or the court, but whilst the commissioners have a discretion within the statutory limits as to the penalty imposed, the court has none. The "tax which he ought to be charged" means the full tax, regardless of the fact that the taxpayer may have made a declaration, as in the present case, and may have paid some tax. If liability is established, the court must impose the full penalty of £20 and treble the tax irrespective of the degree of error which has been made in the return. The Revenue also has no discretion in this matter. If they sue at all they must sue for that amount. This may perhaps appear harsh, but section 500 enables the penalty to be remitted or mitigated after judgment, and proceedings are only taken where the error is deliberate. The same penalty is prescribed for a wide variety of defaults, and irrespective of whether there has been fraud on the part of the taxpayer. It seems that an employer who fails to make a return or list of his employees or a bank which makes an inaccurate return of interest paid would be liable to the full penalty of treble the tax they paid although all the tax has been paid. The one penalty applies whether there has been no direct loss to the Revenue or whether the loss has been enormous.

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[1] Income Tax Act, 1952, s. 25: ". . . (3) A person who neglects or "refuses to deliver, within the time "limited in any notice served on him, "or wilfully makes delay in deliver"ing, a true and correct list, declara"tion, statement or return which he "is required under the preceding pro"visions of this chapter to deliver shall "—(*a*) if proceeded against by action "in any court, forfeit the sum of £20 "and treble the tax which he ought "to be charged under this Act; or "(*b*) if proceeded against before the "General Commissioners, forfeit a "sum not exceeding £20 and treble "the tax which he ought to be "charged under this Act, and where "he is proceeded against before the "General Commissioners, the penalty "shall be recovered in the same "manner as any other penalty under "this Act, and the increased tax shall "be added to the assessment. (4) The "commissioners shall also proceed to "assess or cause to be assessed every "such person who makes default as "aforesaid. . . ."

If the judge were right, the effect of an assessment would be to reduce liability to a penalty of £20. As proceedings can only be taken in the court for treble the tax, the sum to be charged must be determined, and the right and sole way, as required by section 25 (4), that liability can be finally determined is by assessment. If it were otherwise, when proceedings came before the court the court would have to perform the function of the commissioners, but as the commissioners would still be under the positive duty imposed by section 25 (4) to assess the tax liability before the tax could be recovered, there would still have to be an assessment. That assessment might then be appealed from and, in the end of all, it is possible that the court might be found to have given judgment for more than the treble tax. The only textbook which supports the construction that subsection (3) is limited to the difference between the amount which should have been paid and that which was actually paid is Konstam, 12th ed., 1952, p. 383, but no authority is cited for the proposition. The contrary view is supported by Simon, 2nd ed., 1952, vol. 1, p. 290, para. 417. Two assessments were made in this case and no appeal was made against either of them, so that both became final and conclusive as to the sum which ought to have been charged under the Act of 1952 for the relevant year. If an assessment is correct, that is the amount "which ought to be "charged" under subsection (3). The making of an assessment does not alter in any way the liability to the penalty. Once the breach has been established the penalty is automatic. The last three lines of subsection (3) provide that treble penalty has to be added to the tax, but there would never be anything to be added if the judge was right. Subsection (4) applies generally to proceedings whether taken before the court or the commissioners. The fact that the assessment does not affect the quantum of the penalty is confirmed by section 25 and also by section 33 (1) of the Finance Act, 1942, which was picked up by section 47 (1) of the Act of 1952. The section proceeds on the basis that there will be an assessment followed by proceedings for a penalty. Parliament would not have extended the time for bringing penalty proceedings merely for a £20 penalty irrespective of the seriousness of the error.

Some sections clearly provide only for the difference in tax—see section 107 of the Act of 1918—but there is no such provision here and one should not be read in.

[HARMAN L.J. The taxpayer " ought not to be charged " the tax which he has already paid.]

The assessment shows how much he ought to be charged. It is not a question of paying but of liability.

[LORD EVERSHED M.R. Section 107 (1) supports the view that the phrase means the undisclosed difference. The divergence between the powers of the commissioners and those of the court is extravagantly large if that is not so.]

Subsection (4) requires the commissioners to make an assessment of the total tax liability. If a defective return has been made to them the assessment will be incomplete. Subsection (3) is not dealing with the amount of the tax which is due. It is a pure penalty provision. " Treble the tax " goes back to section 55 of the Income Tax Act, 1842. Then, if there was no assessment, one could go to the court for a penalty of £50, but if there was an assessment, one had to go to the commissioners. Under that section it was clear that the penalty was three times the whole duty charged under the Act for that year. There is no material difference between the language of section 55 and that of the Acts of 1918 and 1952. In *Attorney-General* v. *Till*[2] the Court of Appeal held that section 55 did not operate in relation to an incorrect return on the basis that the penalty was treble the whole duty to which the taxpayer was liable under the Act: see particularly Fletcher Moulton L.J. and Cozens-Hardy M.R. The decision was reversed on appeal but none of the speeches in the House of Lords contains a scintilla of dissent from the opinion that treble the duty under that Act equals treble the duty on the whole of the assessment. In *Attorney-General* v. *Johnstone*[3] Rowlatt J. clearly treated the total liability as treble the tax on the whole amount, though his observations were not necessary to the decision in that case. Section 48 of the Act of 1952, the fraud section, is similar to that considered in *Till's* case.[4]

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[2] [1909] 1 K.B. 694; 25 T.L.R. 342.

[3] (1926) 10 T.C. 758.

[4] [1910] A.C. 50.

It is submitted, first, that it is quite impossible to treat the penalty provisions of the Act of 1952 as forming any logical pattern. That was said in *Till's* case,[4] in Konstam and also in the Income Tax Codification Committee's Report, Command Paper 5131. Secondly, "treble the amount of the charge which "ought to have been made upon him" in section 48 has precisely the same meaning as "treble the tax which he ought to be "charged," though Diplock J. attached importance to the change of tense. There is no justification for reading into section 25 words such as "for which the taxpayer was not charged or duly "assessed because of his default," for that would be reading in the proviso to section 48 which could have been used but was not. Section 48 is seldom used; proceedings are either under section 25 (3) or under paragraph 4 of the Sixth Schedule.

The subsection is not explicitly limited to one year, but it has never been interpreted as entitling the Revenue to ask for a penalty on other years. No special significance should be attached to the slight change of language in the comparable sections 107 and 207 of the Act of 1918, for that was a consolidation Act.

In an Irish case, *Attorney-General* v. *White*,[5] the difficulties which would arise if proceedings before the court were allowed to start before the assessment had been finalised were emphasised. It was said that if there is an assessment one can go to the courts, but, if not, the commissioners could deal with the assessment and impose the penalty as part of the same proceedings.

This is a pure penalty provision and does not refer to the determination of the tax which the taxpayer ought to have paid. The liability to the penalty arises on the breach when the return is made and is not reduced by anything which the taxpayer or the Revenue does thereafter. The treble tax bites on the assessment for the particular year whether proceedings are before the commissioners or the court. The increased tax cannot mean the tax properly payable, because that would deprive the taxpayer of the right to challenge the assessment. As Lord Dunedin said in *Whitney* v. *Inland Revenue Commissioners*,[6] the assessment quantifies the amount which should be paid, but the kernel of Diplock J.'s view is that it is that which ought to be charged.

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[4] [1910] A.C. 50.

[5] Unreported, March 3, 1931, Irish Times.

[6] [1926] A.C. 37; 42 T.L.R. 58.

[ORMEROD L.J. What is the position of the secretary of a company? If he is in default in making a return he will have presumably to pay the penalty and the body corporate would also be liable to the treble tax penalty, so that two penalties for the same error would be exacted.]

That is so. It emphasises that there is a wide variety of cases and one description of penalty applies to them all. Section 25 (3) covers more than merely incorrect returns, and the judge's observations cannot be applied to the whole field covered by the provision.

In *Lord Advocate* v. *McLaren*[7] the court plainly held that the penalty was treble the total liability, irrespective of what had been paid. It is not clear whether this case was cited to Diplock J., but it is in point. The tax which the taxpayer "ought "to be charged" is a convenient way of expressing the tax liability in relation to matters on which under the Act he can be assessed. Diplock J.'s language on that is adopted. The difficulty has arisen because this tax provision has been treated as if it were a tax recovery provision. It may be a harsh enactment when applied to so wide a variety of cases, but it has existed in substantially the same form since 1842.

[LORD EVERSHED M.R. What is the position as regards surtax? Suppose a surtax payer fails to disclose dividends for purposes of surtax, for what is he liable?]

The liability for the year in question would be trebled. The section does not apply to income which is taxed at source and which does not have to be declared, except in the case of a surtax payer.

Pennycuick Q.C. following. The meaning of the expression "the money which he ought to pay" depends on the date to which the sentence "ought to pay" relates. The construction put by the Court of Appeal on section 55 of the Act of 1842 in *Till's* case[8] was part of the ratio decidendi and is binding on this court. The issue was whether section 55 applied where an incomplete return had been made. In saying that the fraud penalty was less severe, Cozens-Hardy M.R. assumed by necessary implication that he was taking the view that under section 55 there was imposed a liability to treble the total taxable income, and he thought that that was oppressive. The relative severity of the penalty was mentioned in argument, but neither party contended that the penalty was other than that. The court plainly assumed that that was the construction as to the penalty, and to avoid what they considered was an oppressive and outrageous result it was held that the section did not apply where a return had been made. The Court of Appeal is bound by the reasoning for the decision and not merely by the decision itself.

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[7] (1905) 5 T.C. 110.

[8] [1909] 1 K.B. 694.

[LORD EVERSHED M.R. Prima facie, the court is governed by the decision and the reasoning leading to it. The decision was reversed. It is a question how far the reasoning leading to a wrong decision has any greater weight than a mere observation, and further in *Till's* case [8] the point was not argued.]

In *In re Tapp* [9] an admission in *In re Duke of Norfolk* [10] was held to be part of the ratio decidendi and, therefore, binding.

[LORD EVERSHED M.R. But the *Norfolk* case [10] had not been reversed.]

[Reference was also made to *In re Weigall's Trusts*.[11]]

If the Court of Appeal's decision is reversed by the House of Lords it must always depend on the particular circumstances and the nature of the reasoning and the ground of the reversal how far the reasoning of the Court of Appeal stands as an authority. *Till's* case [12] may not be a binding authority, but it is of great weight. It cannot be said that the House of Lords had not got section 55 in mind, for it was set out in full in the judgment. The Court of Appeal also had fully in mind the nature and the amount of the penalty, and it was because they thought it excessive that they reached their construction. This was a primary reason for the construction that the Court of Appeal put on the section. It was an essential part of the ratio decidendi, and by necessary implication, and expressly by Lord Atkinson, it was approved by the House of Lords. There was no contrary view, though the House reached a different conclusion on the construction of the section. The decision of the Court of Appeal is of such persuasive authority that it should be followed.

[LORD EVERSHED M.R. What would be the position of trustees? The penalty for making an error would apparently vary according to the wealth of the person making the error.]

The defendant taxpayer appeared in person.

Cur. adv. vult.

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[8] [1909] 1 K.B. 694.

[9] [1959] Ch. 443; [1959] 2 W.L.R. 541; [1959] 1 All E.R. 705.

[10] [1950] Ch. 467; 66 T.L.R. (Pt. 1) 695; [1950] 1 All E.R. 664.

[11] [1956] Ch. 424; [1956] 3 W.L.R. 12; [1956] 2 All E.R. 312.

[12] [1909] 1 K.B. 694.

May 11. Lord Evershed M.R. The judgment which I am about to read is the judgment of the court.

The question arising on this appeal is apparently short and simple enough: it is the meaning of a few words in section 25 (3) (*a*) and (*b*) of the Income Tax Act, 1952—" . . . treble the " tax which he ought to be charged under this Act." But the full arguments of the Attorney-General and Mr. Pennycuick have at least made clear that not only the subsection but the whole fasciculus of sections 18 to 30 inclusive, which form part of Chapter II of the Act, and which in large measure trace their descent through the Income Tax Act, 1918, from that of 1842, has in the course of 117 years and in greatly changed circumstances acquired an obscurity, and in some respects an artificiality, quite remarkable even in a taxing statute. As long ago as 1909, Cozens-Hardy M.R. described the prototype of the subsection under review, section 55 of the Act of 1842, as " ungrammatical and almost unintelligible." The language of that section has nevertheless been reproduced, substantially unchanged, in the two consolidating statutes of 1918 and 1952. We shall, in the course of this judgment, have occasion to refer to more than one of the problems which the present subsection and its fellows present, problems which (if they are soluble at all) it is fortunately unnecessary for us to solve.

It is the contention of the Crown that the words we have cited mean " treble the taxpayer's whole (properly) assessed tax " for the relevant year." If that view be right, results and anomalies of an extravagant kind follow. Yet it is clear that the court (unlike the commissioners) has no dispensing power under the subsection. The remedy in the last resort, according to the Crown's argument, is found in the power of the commissioners or the Treasury (for example, under section 500) to mitigate or remit the penalty before or after judgment. It has indeed been urged upon us that the Crown's practice has been consistent for over a century and that we should give judicial sanction to it, relying upon the Treasury in the exercise of its statutory discretion to avoid harshness or injustice. We have no warrant to suggest that the Treasury's discretion has not at all times been most fairly and properly exercised, and certainly in the present case we can see no ground for sympathy with the defendant, who, being an officer in the Department of Customs and Excise, deliberately failed to make true and correct disclosure over many years of one source of untaxed income of his wife and himself, namely, the Post Office Savings Bank. Nevertheless, we venture to think that the results of the Crown's contention —particularly at a time when present rates of taxation may swell the penalty for a trifling mistake to almost astronomical figures —are most unsatisfactory however well the Treasury's discretion be exercised; and we express the hope accordingly that Parliament may find time to review the sections in question.

The facts of the case are themselves not free from obscurity; but for the purpose of this appeal they may not greatly matter. We have said that the defendant was and is a servant of the Crown employed in the Customs and Excise Department. His salary as such was taxable under Schedule E, and tax was levied at the source under P.A.Y.E. For the tax year 1952/53 this levy was £125 6s. 6d. He had for the same year disclosed in his income tax return the sum of £18 6s. for Post Office Savings Bank interest received by himself and his wife. It is not now in doubt that the true amount of such interest was £51 5s. 9d. As we have said, he had made similar understatements for a number of previous years. He has now been duly assessed for the year 1952/53 in the full sum of £51 5s. 9d. According to the writ in the action the full tax assessment for the year is £139 11s. 6d., namely, £125 6s. 6d. Schedule E tax in respect of his employment and £14 5s. 0d. "Income Tax Schedule D in "respect of untaxed interest." In an earlier paragraph of the writ reference is made to the amount of £18 6s. 0d. which the defendant had disclosed. But the sum of £14 5s. 0d. represents arithmetically 9s. 6d. in the £ on £30—9s. 6d. being the appropriate rate of tax. From one of the documents in the case, containing a computation by the Crown of the amount of tax properly due from the defendant in respect of the difference between the sums received for Post Office Savings Bank interest and the sums disclosed, there appears against the year 1952/53 the item for bank interest "Assessed, say £21," a sum less by £30 than the true amount of such interest; and £14 5s. 0d. is shown as the amount of tax (at 9s. 6d. in the £) on this figure of £30. In the circumstances, it must, we suppose, be assumed for the purpose of this case that the defendant had been assessed and taxed in respect of Post Office Savings Bank interest on the sum of £21 but that, as later appeared, the true and correct amount of such interest for the year was £30 more, namely, £51.

Even so, however, the claim made by the writ appears to be entirely at variance with the Crown's so-called practice, according to which he should now be charged the treble penalty not only on the P.A.Y.E. tax and not only on the tax on the excess income of £30, but on the full amount of the Post Office Savings Bank interest, £51 odd—let alone on certain other income which appears from his return. For the purposes of this case, however, and in view of the conclusion which we have formed, it is sufficient to say that £14 5s. 0d. must be taken to represent the tax (at 9s. 6d. in the £) on the undisclosed amount of bank interest, namely, £30.

It is nevertheless to be observed that the Crown's view of the true construction of the subsection which forms the second ground of appeal stated in the notice in the present case is inconsistent with the claim in the writ at least in two respects: first, the claim was not confined to sums charged by direct assessment as it included P.A.Y.E. levy; second, £14 5s. 0d. was not the tax on the whole Post Office interest but only on the balance of £30 undeclared.

We return now to the question of construction of section 25 (3). The view of the judge was that the Crown's claim must be limited to £20 only. He was of opinion that since before the issue of the writ the defendant had been assessed in the sum of £139 11s. 6d., namely, £125 6s. 6d. under Schedule E plus £14 5s. 0d., it could no longer be said that, at that date, there was any tax which the defendant "ought to be charged under "the Act." It was also the judge's view, though this is not reflected in his decision, because of the opinion above referred to, that the essential phrase, "the tax which he ought to be "charged," is limited to the tax for which he should be charged, but was not in fact charged upon his income tax return as a result of his incorrect statement therein of the amount of bank interest—that is, in figures, £14 5s. 0d. Upon this third view the Crown would be entitled to judgment (in addition to the sum of £20) for three times £14 5s. 0d., or £42 15s. 0d. The Crown's dissent from this view forms its first ground for the present appeal, as the notice shows.

We propose to consider the question first as a matter of construction of the Act, without reference to any decided cases; and then to see whether the conclusion at which we so arrive is affected by any decision binding upon this court. It is necessary, first, to refer at some length to the group of sections to which we have already alluded.

Section 18 is the first of a series of sections under Chapter II with a crossheading "Returns and Assessment." Subsection (1) reads: "It shall be the duty of every person who is chargeable "to income tax for any year of assessment to give notice to the "surveyor that he is so chargeable at or before the end of that "year . . ." I can pass over the proviso. Subsection (2): "If any person, without reasonable excuse, fails to give such a "notice as aforesaid, he shall (*a*) if proceeded against by action "in any court, forfeit the sum of £20 and treble the tax which "he ought to be charged under this Act; or (*b*) if proceeded "against before the General Commissioners, forfeit a sum not "exceeding £20 and treble the tax which he ought to be charged "under this Act, and where he is proceeded against before the "General Commissioners, the penalty shall be recovered in the "same manner as any other penalty under this Act, and "the increased tax shall be added to the assessment."

Section 19: "Every individual, when required so to do by a "notice given to him by the surveyor, shall, within the time "limited by the notice, prepare and deliver to the surveyor a "true and correct return in the prescribed form of all the sources "of his income and of the amount derived from each source for "the year preceding the year of assessment, computed" as therein provided; and again I can pass over the proviso.

Section 20 contains a similar provision relating to the current year's chargeable income, and I need not read that; or the supplemental provisions in subsections (2), (3) and (4); but I should perhaps add that there is at the end of subsection (4) a proviso as follows: "Provided that the penalty inflicted upon "any person proceeded against for not complying with this "provision who proves that he was not chargeable to tax shall "not exceed five pounds for any one offence."

Section 21 (1): "Every person acting in any character on "behalf of any incapacitated person or person not resident in "the United Kingdom who, by reason of such incapacity or "non-residence in the United Kingdom, cannot be personally "charged under this Act, shall, whenever required to do so by "a notice given to him by the surveyor, within the time limited "by the notice and in any division in which he may be chargeable on his own account, deliver such a statement as in the "last preceding section is described of the profits or gains in "respect of which tax is to be charged on him on account of "that other person, together with the prescribed declaration." Subsection (2): "Where two or more such persons are liable to "be charged for the same person (*a*) one statement only shall be "required to be delivered which may be made by them jointly, "or by any one or more of them"; and then there is a second provision, (*b*), which I need not read.

Section 22 is a somewhat similar provision, which I think I can summarise by saying that it involves the obligation to deliver a list by persons in receipt of taxable income belonging to others containing a true and correct statement of all income and the names and addresses of the persons concerned, etc.

Section 23: " Every person, when required so to do by a " notice served on him by the surveyor, shall, within the time " limited by the notice, prepare and deliver to the surveyor a " list, in writing, containing to the best of his belief (*a*) the name " of every lodger or inmate resident in his dwelling-house; and " (*b*) the name and ordinary place of residence of any such " lodger or inmate who has any ordinary place of residence else- " where at which he can be assessed," etc. Section 24 I can, again, summarise as being related to returns as to the annual value of land.

I come to section 25. Subsection (1): " Any such lists, " declarations, statements and returns as are provided for by " the preceding provisions of this chapter shall be in such form " as the Commissioners of Inland Revenue shall prescribe. and " in prescribing forms under this subsection the commissioners " shall have regard to the desirability of securing, so far as may " be possible, that no person shall be required to make more " than one return annually of the sources of his income and the " amounts derived therefrom." Subsection (2) I think I can pass over, as it provides for a general declaration as regards profits under Schedule A, B, D or E.

Subsection (3) (which is the vital subsection for the purposes of this appeal): " A person who neglects or refuses to deliver, " within the time limited in any notice served on him, or wilfully " makes delay in delivering, a true and correct list, declaration, " statement or return which he is required under the preceding " provisions of this chapter to deliver shall (*a*) if proceeded " against by action in any court, forfeit the sum of £20 and " treble the tax which he ought to be charged under this Act; " or (*b*) if proceeded against before the General Commissioners, " forfeit a sum not exceeding £20 and treble the tax which he " ought to be charged under this Act, and where he is proceeded " against before the General Commissioners, the penalty shall " be recovered in the same manner as any other penalty under " this Act, and the increased tax shall be added to the assess- " ment." It will be noticed that these penal provisions are ipsis verbis the same as those already once stated in section 18.

Subsection (4): "The commissioners shall also proceed to "assess or cause to be assessed every such person who makes "default as aforesaid." Subsection (5) provides for some relief, for it contains a provision that if a person required to deliver a list (etc.) states the reasons for his inability to have done so he shall not be liable to the penalty if the commissioners are satisfied with his reasons and if he delivers within a further time "as perfect a list . . . as the nature of the case permits." I leave out subsections (6) and (7).

Section 26 also I can summarise, as it relates to returns by persons coming to reside in a particular division. Section 27 I must read more fully. Subsection (1): "Every employer, when "required to do so by notice from the assessor, shall, within the "time limited by the notice, prepare and deliver to the assessor "a return containing (*a*) the names and places of residence of "all persons employed by him; and (*b*) the payments made to "those persons in respect of that employment"—as provided in the rest of the subsection. I need not read the further provisions of that subsection, and I pass to subsection (2), which provides: "Any director of a company, or person engaged in the manage-"ment of a company, shall be deemed for the purposes of this "section to be a person employed"; and subsection (3): "Where "the employer is a body of persons, the secretary of the body, "or other officer (by whatever name called) performing the "duties of secretary, shall be deemed to be the employer for "the purposes of this section: Provided that where the employer "is a body corporate, that body corporate shall be liable to a "penalty for failure to deliver a return in pursuance of this "section as well as the said secretary or other officer."

Section 28, having been repealed, I do not read. Section 29 (1): "Every person carrying on a trade or business who, in "the ordinary course of the operations thereof, receives or retains "money in such circumstances that interest becomes payable "thereon which is paid or credited without deduction of income "tax, and, in particular, every person carrying on the trade or "business of banking, shall, if required to do so by notice from "a surveyor, make and deliver to the surveyor, within the time "specified in the notice, a return of all interest paid or credited "by him as aforesaid during a year specified in the notice in the "course of his trade or business or any such part of his trade "or business as may be so specified, giving the names and "addresses of the persons to whom the interest was paid or "credited and stating, in each case, the amount of the interest."

I can pass over the proviso to that subsection; and I can also omit a reading of the remainder of the section.

Section 30 (which is the last of this series of sections) is: "The provisions of section 25 of this Act with respect to the "failure to deliver lists, declarations, statements and returns" —and I interpose by way of reminder that that is the section with the provisions of which we are now concerned—"shall "apply to returns under the three last preceding sections." Having regard to the repeal of section 28 that should, of course, now read "sections 27 and 29"—the obligation to deliver lists of employees and what I for convenience call compendiously the bankers' obligation.

Whatever other epithets the language of the sections or any of them may invite, it is impossible to acquit them of a considerable degree of repetition or overlapping and inelegance. The two parallel and independent penalties exigible by the General Commissioners on the one hand and by the court on the other, which are found in section 25 (3), are found also in section 18 (relating to the failure of persons chargeable to tax to give notice of chargeability): these same penalties are expressed in section 25 (3) to be exigible on default in delivering a "true "and correct statement or return" as required by any of the sections 19 to 24 inclusive: further, by section 30 the penalties under section 25 are made applicable to the returns required by sections 27 and 29. Much more curious is the phrase at the end of section 18 (2) repeated at the end of section 25 (3), "and the "increased tax shall be added to the assessment." To no part of the subsection was the use of the adjective "unintelligible" by Cozens-Hardy M.R. more appropriate than to this baffling sentence. It was strongly contended by the Attorney-General that by the words "increased tax" was meant the amount of treble the tax (or less) which the commissioners are by subsection (2) of section 18 and subsection (3) (*b*) of section 25 entitled to forfeit. The argument finds support in the submission that otherwise the provisions of subsection (4) of section 25 (at least in cases of proceedings before the commissioners) would be otiose, notwithstanding the use therein of the word "also"; but perhaps more forcibly in the old statutory provisions (see, for example, section 21 (6) of the Taxes Management Act, 1880) that penalties exacted by the commissioners should be recoverable by way of their being made the subject of assessment. But the contention involved the Attorney-General in the concession that the word "penalty" in the penultimate line of section 18 (2) and of section 25 (3) meant only the fixed sum of £20—a concession very difficult to accept on more grounds than one, including the use of the same word "penalty" in subsection (5) of section 25, where it would be virtually impossible so to confine it. But the difficulties of interpretation of this perplexing sentence are much enhanced by the circumstance that section 25 (3) might well, and section 18 (2) almost inevitably would, apply to cases in which there had previously been no assessment at all. We have, however, come to the conclusion that the solution, if possible at all, of this particular problem cannot materially assist in providing the answer to the instant question. We therefore confine ourselves to observing that the difficulty created by the sentence mentioned may well illustrate the justice of the comment made in the Irish case later mentioned that amendments and additions have been made in the course of time to the original enactment without any proper appreciation of their effect; and certainly reinforces our earlier plea that Parliament should find time to consider the advantage of making penal provisions of a taxing statute reasonably intelligible to those who may be affected by them.

We return once more to the essential formula for present purposes ". . . the tax which he ought to be charged under this "Act." We do not at all deny that the words are capable of the meaning which the Crown attributes to them, namely, the tax (that is, the entire amount of tax) which ought to be charged, as distinct from the (smaller) amount, if any, which has in fact been charged by reason of the deficiency of the taxpayer's return. This, however, is not in truth the meaning attached to it by the Crown, which in practice omits income not taxed by direct assessment, but by deduction, with an exception, illustrated in this case, of income deducted under P.A.Y.E. (See the second ground of appeal.) Moreover, no reference is made in the subsection to the year of assessment. The Crown seeks to overcome this difficulty by observing that any return must in the nature of things be related to a year: and if this were the only difficulty the answer might, we will assume, suffice. But there are other and far graver difficulties: for it is not in doubt (nor has the Attorney-General sought to deny or excuse it) that the Crown's contention involves anomalies so extravagant as to be shocking in a penal provision. We do not attempt an exhaustive list, but observe that the penalty is one which the court (according to the Attorney-General) is bound to exact without remission or mitigation and is so bound notwithstanding that the offence may be relatively trivial or even adverse to the taxpayer's interest. It is first to be noted that "tax" will include surtax as well as income tax at the standard rate—though surtax in any year is commonly payable in respect of a different year of assessment from income tax. It is true that the intrusion of surtax, not dreamt of in 1842, presents, on the third view above formulated, an inescapable difficulty in any case; for if "the "tax which he ought to be charged" be limited to tax evaded by the incorrect return, such "tax" would include surtax; and there is no indication which year is intended nor whether the undisclosed income should, for penalty purposes, be treated as that part of the income which in the particular case attracts the highest rate of surtax.

We will next refer to the effect of the Crown's contention upon a case arising under section 21 (and similarly under section 22) where one or more persons (and commonly it will be more than one) are bound to make returns of the taxable income of a third party. The Attorney-General expressly conceded that, in such a case, where a statement incorrect in some respect had been made, each of the persons liable to make such a return would be liable to a penalty including a sum equivalent to three times his own personal tax liability—a penalty which would be liable to vary enormously as between one such person and another, both equally at fault, according to their own respective incomes. An escape from so apparently absurd and unjust a conclusion might be found by relating the tax penalty to that of the person on whose behalf the return was made; but this means of escape was not embraced by the Attorney-General.

In this connection the Attorney-General informed us, and the stated ground of appeal shows, that, according to the practice of the Treasury "the tax which the taxpayer ought to be charged" excluded tax deducted at the source other than P.A.Y.E.—by way of distinction from cases arising under paragraph 4 of Schedule VI to the Act, to which we later refer. With all respect to the Attorney-General, we have failed to find any justification in the statute for the distinction: but assuming it to be well-founded, it follows that a startling anomaly arises in point of liability between a taxpayer whose income is wholly or substantially directly taxable and one whose income is substantially derived from sources attracting tax deduction at the source —an anomaly which might well be thought to run quite contrary to ordinary justice, giving (as it does) an immense advantage to the taxpayer whose income is wholly or substantially unearned.

Even more startling are the anomalies arising under sections 23, 27 and 29; for failure to return accurate lists under any of these sections will expose the defaulter to penalties wholly unrelated to the extent of the default but calculable by reference to his own tax liability albeit fully discharged. Thus, in an extreme, though not extravagant case, a company which failed to return an accurate list of employees would be liable to a penalty equivalent to three times its own tax liability, which might run into hundreds of thousands; and not only so, but the secretary of the company (who might be the person in fact responsible for the default) would also be liable for a penalty calculated on his own personal tax assessment—a sum enormously less than the corresponding liability of his employer.

Nor is this by any means all. In the present case the Crown has expressly disclaimed any allegation of fraud against the defendant. Yet had the case been otherwise—that is, had the default of the defendant been treated as dishonest—then prima facie section 48 of this Act would have been applicable. Subsection (1) of that section provides: "Where a person who ought "to be charged with tax, as directed by this Act, is not duly "assessed and charged by reason that he has (*a*) fraudulently "changed his place of residence or fraudulently converted, or "fraudulently released, assigned or conveyed any of his property; "or (*b*) made and delivered any statement or schedule which is "false or fraudulent; or (*c*) fraudulently converted any of his "property, which was chargeable" (in the way there indicated); "or (*d*) been guilty of any falsehood, wilful neglect, fraud, covin, "art or contrivance whatsoever, such person shall, on proof "thereof to the General Commissioners for the division in which "he has been charged, or, if he has not been charged, then for "any division in which he is chargeable, be assessed and charged "treble the amount of the charge which ought to have been "made upon him: Provided that, if any charge has been made, "but that charge is less than the charge which ought to have "been made, such person shall be assessed and charged, over "and above the former charge, treble the amount of the difference between the charge which was made and the charge which "ought to have been made, such amount to be added to the "assessment"; and subsection (2) contains a provision rendering a third party abetting or aiding such a fraudulent disclosure liable to a penalty of £500.

It is to be noticed that the relevant words in the section differ somewhat from those in section 25 (3); for the words in the former case are " . . . the amount of the charge which ought "*to have been* made upon him." It was the contention of the Crown that these words have, in effect, the same meaning as the language in section 25 (3)—" tax which he ought to be " charged." Nonetheless, the proviso in section 48 makes it clear that, in cases under that section, only what we will for brevity call the excess tax is to be taken into account in assessing the liability. On that view it is, at the least, a startling proposition that the taxpayer's penal liability in cases of fraud is very much less than his liability in the absence of fraud; the result being that it would be an advantage to the Crown to treat the rogue as an honest man. Dishonesty, it seems, is plainly indicated as the best policy for the taxpayer.

It is convenient here to refer to two other provisions of the statute. The first is paragraph 4 of the Sixth Schedule, applicable again to fraud—in this case in relation to a claim for tax relief. Sub-paragraph (1), so far as relevant, is as follows: " A " person who, in making a claim for or obtaining any relief to " which this Schedule relates, or in obtaining any certificate as " aforesaid (*a*) is guilty of any fraud or contrivance; or (*b*) " fraudulently conceals or untruly declares any income or any " sum which he has charged against or deducted from, or was " entitled to charge against or to deduct from, another person; or " (*c*) fraudulently makes a second claim for the same cause, shall " forfeit the sum of £20 and treble the tax chargeable in respect " of all the sources of his income as if such claim had not been " allowed "; and again there is a sub-paragraph relating to a person abetting.

It will be noticed that once again there is a variation in language—in this case it is " the tax chargeable in respect of " all the sources of his income, . . . " a formula plainly apt (as the Scottish Court of Session has in fact held in *Lord Advocate* v. *McLaren* [1]) to cover the total tax liability, without any exception for tax deducted at the source.

Our second reference is to section 49, applicable to a case where an increased assessment has been properly made and there has been any " fraud, covin, art or contrivance " on the taxpayer's part; in which case his penal liability is " treble the " amount of the tax on the amount of the excess "—a phrase which we assume to be intended as synonymous with the third possible construction above mentioned of the relevant words in section 25 (3).

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[1] (1905) 5 T.C. 110.

We make no attempt to answer the question why there should be so much variation in the penal consequences of defaults—why fraud in one case (under section 48) should be so much more lightly punished than fraud in another (under the Sixth Schedule), and what is the exact place of section 49 in relation to sections 19 to 24. There is, of course, much force in the Crown's argument that if in section 25 (3) Parliament had intended to limit the penal tax liability to what we have called the excess tax, it could or would naturally have resorted to the language used in section 49 or the qualifying proviso of section 48. On the other hand, the numerous and illogical variations in penalty produce in our view the result that no safe assistance can be got from the language of other sections of the Act in construing the words of section 25 (3).

We do not think it necessary or useful to refer to the corresponding provisions and the corresponding anomalies in the earlier legislation—save in one respect. Until the year 1923 and the passing of the Finance Act of that year, which by section 23 (2) introduced what is now paragraph (*a*) of section 25 (3), the penalty which the court had to exact, if proceedings were brought before it instead of the commissioners, was the fixed sum of £50 only. It is obvious, therefore, that the worst of the anomalies to which we have above referred did not arise before 1923; for even if the phrase " treble the tax which he ought to be charged " were construed as the Crown suggest, the commissioners were not bound to exact its full measure. The startling feature of the present legislation is that, however extravagant the result, the court is now bound to forfeit the full penalty and the Crown may to that end invoke section 25 (3) even though the more appropriate section, according to the facts of the case, might appear to be section 48 or section 49—neither of which exacts, even though the case be one involving fraud, anything like so extreme a forfeit. The remedy of the subject is left to the power of the Treasury (or the commissioners) to mitigate the penalty or stop the proceedings under section 500 or section 55. As we have earlier said, we cannot think the result either just, sensible or satisfactory, however well and conscientiously the discretions be exercised.

These, then, being the consequences of the Crown's contention upon the construction of the subsection, are there other possible interpretations less extravagant in their results?

Diplock J. avoided what he called the absurd and unjust consequences of the Crown's contention by holding that once the defaulting taxpayer had been duly and properly assessed (as was the case with the defendant before the issue of the writ) then it could no longer be said that he " ought to be charged " with the tax for which he had been assessed; in other words that, by the assessment, he had been charged and there was, accordingly, at the relevant date nothing left undone which ought to be done.

We do not think that this can be right. It appears to us that the offence is committed either when the false return is received by the commissioners or when the time for making the return has expired. Subsequent events, whether assessment or payment, are irrelevant. In order to arrive at the correct figure which has to be multiplied by three, assessment is a necessary preliminary, and therefore, if the judge be right, the penalty, apart from the £20, could never be levied because there would never come into existence the basis for it. We add that, in the case in the Irish Supreme Court of *Attorney-General* v. *White*,[2] the judges adopted this view and held accordingly that the proceedings to recover the penalty of £20 plus treble the tax under the corresponding legislation in Ireland were premature where there was no final assessment of the tax.

There remains the judge's interpretation of the relevant words (the third view above indicated), namely, that " the tax which he " ought to be charged " means what we have called the excess tax—that is, the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. Where there has been failure to make any return at all, the " tax which he ought to be charged " will, of course, be the total of his tax liability for the relevant period. But where, as in the present case, the taxpayer's default lay in an understatement of one of his sources of income, then the tax which he ought to be charged will, on this interpretation, mean the tax which he ought to be charged (but was not charged by reason of his default) on the undisclosed income.

It is no doubt true that if you speak of the " sum I ought to " be charged " for an article which you have bought, you may be supposed to be referring to the true price of the article in contrast to the amount of the bill which you have in fact received. But where you have already had a bill (and more particularly when you have paid it) it would, we think, be more natural, if you wished to refer to the true price, to speak of " the sum I ought " *to have been* charged "; and these, be it noted, are the words used in section 48. So in a case arising under section 25, where

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[2] Unreported, March 3, 1931.

(as must not uncommonly be the case) the taxpayer has already been charged an assessed sum of tax and paid it and then, later, an undisclosed item of income is revealed, it would surely be more natural if the total tax liability was intended to refer to the tax which "he *should have been* charged."

We do not forget that the word is "charged" not "assessed." On the other hand, the phrase is "ought to be charged" and not "is chargeable." Mr. Pennycuick was disposed to concede that if in ordinary speech you refer to your bills which ought to be paid or the letters which you ought to write, you are in each case referring to those things only which at the time of speaking you have left undone. So, as a matter of English, it seems to us at least a legitimate interpretation of the phrase "tax which he "ought to be charged" to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return: in other words, the tax appropriate to the undisclosed income.

We agree that, if such had been the intention, Parliament might have been expected to use the formula adopted in section 49. We observe, however, that the provisions of section 49 differ materially from those of section 127 of the Act of 1842, which was its original ancestor: in that, as we understand the latter section, the taxpayer was relieved from any forfeit in the absence of any fraud, covin, art, or contrivance, etc. At least it may equally be said that, on the Crown's view, recourse could have been had to the language found in paragraph 4 of Schedule VI; for, with all respect to the Attorney-General and the so-called practice of the Treasury, we find difficulty in apprehending the justification for excluding tax (or certain tax) deducted at the source from the penal consequences of section 25 (3). We have referred already to the (as we think, significant though slight) variation in language between section 25 (3) and section 48. But, in any case, as we have earlier stated, we do not think that any sufficiently safe guide to the construction of the relevant subsection can be extracted from the language of other parts of what has been called (in the Income Tax Codification Committee's Report Command Paper 5131) the "flotsam and jetsam" of the penal provisions of the Act.

There is, however, one final matter which seems to us of some significance. It will be observed that, though (according to the Crown's contention) the tax referred to in the subsection means the entire tax liability (with the exception conceded) for the

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relevant year, there is in the subsection no reference whatever to the year or to any period of assessment. The Attorney-General's answer was that all the relevant sections must be treated as related to statements or returns for a particular tax year. But the answer is not, we think, satisfactory. A case may well be supposed in which an undisclosed item of income received in a particular year is revealed, say, two or three years later, when the taxpayer has long since discharged his liability, calculated on his defective return, for the year in which the undisclosed income was received. If the Crown's contention were correct you would, as we think, at least expect some language specifying the relevant year. We do not refer again to the surtax difficulty. But the point we are making is, we venture to think, more striking if applied to cases of failure to deliver lists of lodgers or of employees; for in those cases the taxpayer penalised will not have failed at any stage to pay all the tax for which he is chargeable. In such cases, which, then, is the relevant year—the year to which the list of lodgers or employees was intended to relate, or the year in which the default in delivering the list occurred? If the interpretation which we are now suggesting be the true interpretation, then the absence of any reference to time or to any year of assessment is natural and appropriate; for the tax referred to is the tax in relation to a specific item or number of items not disclosed at a date or dates when disclosure should have been made.

But over and above all these considerations we take, we confess strongly, the view that the interpretation now put forward most closely conforms to sense and justice. If an amount of tax has been evaded, then upon disclosure the taxpayer is bound to pay it and is liable to a penalty of three times the amount of such tax. Where no tax has been evaded by the defaulting party, there is certainly no logic in relating the penalty to the tax liability he has faithfully discharged; and at least if the default persists, new demands may presumably be repeated with penal results on each occasion of default. We do not say that all anomalies are avoided, but we do say that they lose their absurd and extravagant character.

Treating the matter, then, as res integra, we would conclude that the phrase " tax which he ought to be charged " has the limited significance which we have for brevity called " the excess " tax." It remains to consider whether we are constrained to a different conclusion by authority binding upon this court.

There has been no decision of any court directly upon the point which we have to decide. It is said by the Attorney-General that the construction for which he contends has so far always been assumed; and if that is so, then it may fairly be said of those responsible that the way in which the discretions vested in the Treasury have been exercised has been such that the Crown's view has been generally accepted. The assumption was undoubtedly made by Rowlatt J. in *Attorney-General* v. *Johnstone* [3]; but the Attorney-General concedes that he cannot for present purposes further rely upon the dictum of that learned and experienced judge. Support for the Crown's view may also be derived from the textbooks—see, for example, Simon, 2nd ed., 1952, vol. 1, p. 290, para. 417; though a contrary opinion is found in Konstam, 12th ed., 1952, para. 383. We have already referred to the Scottish case *Lord Advocate* v. *McLaren* [4]; but that was concerned with the different language of paragraph 4 of the Sixth Schedule. In this paucity of authority there remains, however, *Attorney-General* v. *Till*,[5] reported in the Court of Appeal and in the House of Lords,[6] and upon this case, and most particularly upon certain language of Cozens-Hardy M.R. and Fletcher Moulton L.J. in this court, the Crown have most strenuously relied.

It is first necessary to observe that *Till's* case [6] arose under section 55 of the Income Tax Act, 1842, when the penalty exigible by the courts was limited to £50. The question, therefore, before the court and the House of Lords in *Till's* case [6] was confined to this—whether Mr. Till was liable to forfeit £50. The relevant facts were that, having married a lady in whose favour the firm of solicitors of which he was the sole member had covenanted to pay an annuity of £200, Mr. Till had omitted in his relevant income tax return to include that annuity. Mr. Till's contention was—and it was the sole issue in the case—that section 55 applied only to cases where the taxpayer had made no return for tax at all and did not, therefore, cover the case where, a return having been made, it later appeared not to have been a true and correct return. The considerable argument, as reported, turned upon the effect of the words " as aforesaid," which are found in section 55. It was, however, one of Mr. Till's main contentions in support of his denial of liability (upon which, as Lord Loreburn observed in the House of Lords, he had the misfortune to persuade not only himself but the Court of Appeal) that a contrary conclusion

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[3] (1926) 10 T.C. 758.

[4] 5 T.C. 110.

[5] [1909] 1 K.B. 694.

[6] [1910] A.C. 50.

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involved the absurd and extravagant result that the commissioners (though not the court) would be able to impose upon a taxpayer who had made one omission, however insignificant, in his return, a penalty including treble his entire tax liability for the year. Since that view of the corresponding powers of the commissioners coincided with the consistent interpretation and practice of the Inland Revenue Department, counsel for the Crown were not concerned to challenge it either in the Court of Appeal or the House of Lords; and it was therefore assumed in argument throughout. The Court of Appeal accepted Mr. Till's argument and dismissed the action. In the course of his judgment, Cozens-Hardy M.R. (in support of the view which he took) said [7]: "(4) The Act imposes a penalty on a false or fraudulent statement which is less severe than that which, on the other hypothesis, is imposed upon an honest mistake." Fletcher Moulton L.J. said [8]: "It seems a very startling proposition that the slightest inaccuracy in a statement should make its delivery a nullity. It is not in accordance with ordinary legislative usage, and I am of opinion that if the legislature had intended that this penal clause should have so far-reaching an effect it would have used very different language to express its intention. Moreover, the nature of the penalty raises a presumption that it relates to an absolute non-delivery and not to errors in the statement delivered. It will be seen that the amount of the penalty is 'treble the duty at which such person ought to be 'charged,' or, in other words, treble the duty on the whole assessment. That the measure of the penalty should be based on the duty on the whole assessment may be necessary and proper where there is a total failure to make any return whatever, but all justification for this course disappears when a return has been made and the only complaint is that it contains an inaccuracy."

If the matter had rested with the Court of Appeal decision, it might fairly be said that the acceptance by two of the judges of the Crown's present contention formed part of their rationes decidendi; though the decision would have been fatal to the Crown in the present case upon other grounds. But the decision of the Court of Appeal was reversed in the House of Lords. It is true that none of the noble Lords expressed any dissent from the views expressed in the Court of Appeal on the words "tax at which he ought to be charged"—and Lord Atkinson certainly may be said expressly to have endorsed them when he said[9]: " With all respect to the Court of Appeal, it would " appear to me that, finding themselves confronted with this " contention, they allowed themselves to be too much influenced " by the quite natural repugnance which one must necessarily " feel against adopting a construction of these enactments which " would render the subject liable to those very heavy penalties " if, whilst honestly endeavouring to furnish a correct statement " according to his lights, he made some mistake or was guilty " of some error in estimating what his gains and profits amounted " to."

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[7] [1909] 1 K.B. 694, 700.

[8] Ibid. 702.

It is, however, plain that such views could by no possibility be regarded as constituting a ground for the decision of the House. The validity of those views was, as we have said, assumed throughout; and their only relevance in the House was whether, assuming their validity, they sufficed to defeat the Crown's claim. In the circumstances, these views cannot, in our judgment, have any binding authority. At best they are dicta, deserving due weight as such.

This view of the present effect in the circumstances of the opinion expressed by Cozens-Hardy M.R. and Fletcher Moulton L.J. (above quoted) is supported by the case in this court of *In re Hodson's Settlement.*[10] In that case Farwell J. at first instance had felt himself bound by the decision of this court in an earlier case, *Attorney-General* v. *Lloyds Bank Ltd.*,[11] in the course of which this court had held that a still earlier case in the House of Lords of *Adamson* v. *Attorney-General*[12] had laid down certain principles which, when applied to the deed with which the court was concerned (as the court construed it) in the *Lloyds Bank* case,[13] produced a result which he, Farwell J., thought it his duty to follow in *Hodson's* case.[14] But in the case last mentioned, this court pointed out that the construction of the relevant deed in the *Lloyds Bank* case[15] which this court had accepted had been shown by later cases in the House of Lords to have been incorrect: " and that means," as Clauson L.J. observed in reading the judgment of the court,[16] " that the " principles enunciated in the judgments in this court, though " entitled no doubt to the most serious consideration, have been " formulated in regard not to the correct, but to a hypothetical,

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[9] [1910] A.C. 50, 54.
[10] [1939] Ch. 343.
[11] (1935) 151 L.T. 268.
[12] [1933] A.C. 257.
[13] 151 L.T. 268.
[14] [1939] Ch. 343.
[15] 151 L.T. 268.
[16] [1939] Ch. 343, 358.

"and in fact erroneous, view of the meaning and effect of the "material deed. In our judgment this circumstance leaves it "open to this court to refuse to accept the stated principles as "necessarily correct."

So in the present case it is equally open to the court not to accept as necessarily correct the views expressed in *Till's* case [17] of the construction of the formula "the tax which he ought to "be charged" which were applied to support the erroneous conclusion of the effect of section 55 of the Act of 1842. And in assessing the weight of these views it is essential to bear in mind that the question of construction with which we are concerned was not an issue in the case; not only so, but it was never argued at any stage, the interpretation which was assumed being adopted by both sides—for different reasons—as that most suited to their respective interests.

There is, therefore, in our judgment, no authority which requires us to reject the interpretation of the relevant language of section 25 (3) which, independently of authority, we regard as the right one. The result is that the contention which the Crown has put forward on the appeal must, in our judgment, be rejected. But since we have been unable to accept the construction most favourable to the defendant on which the judge founded his judgment, we think the order made by him should be varied by substituting for the sum of £20 the sum of £62 15s. As we understand that the Crown has agreed in any event to pay the costs of the appeal, there will be an order to that effect also.

Appeal dismissed with costs for defendant.
Order of Diplock J. varied.
Leave to appeal to House of Lords, on terms that Crown pay defendant's costs, as between solicitor and client in the House.

Solicitors: *Solicitor of Inland Revenue.*

E. D.

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[17] [1909] 1 K.B. 694.

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May 8.

Lord Evershed M.R., Willmer L.J. and Cassels J.

May 12, 13, 14.

Lord Evershed M.R., Ormerod and Willmer L.JJ.

ARMSTRONG *v.* SHEPPARD & SHORT LTD.

[Plaint No. 3385.]

Trespass—Oral licence—Licensor unaware of his ownership—Revocation of licence to construct sewer—Rights of licensee—Injunction—Damages.

Injunction—Trespass—Trivial damage—Misrepresentation.

Licence—Revocation—Gratuitous licence to construct sewer on licensor's land—Licensor unaware land his—Power to revoke licence.

Misrepresentation (discretion to refuse order)—Injunction—Trespass to land—False denial of oral permission.

The plaintiff owned a small strip of land at the rear of his premises on which the defendants had entered and constructed a sewer for the discharge of sewage and effluent. The plaintiff claimed damages for trespass and an injunction to restrain the discharge of effluent through the sewer. He swore that he had never had any conversation with the defendants about the matter. The county court judge found, as a fact, first, that the plaintiff had orally informed the defendants that he did not object to the construction of the sewer and, secondly, that the plaintiff, when he so stated, was not aware that he was the owner of the strip of land or that he had a right to object to the construction of the sewer. The judge awarded to the plaintiff 20s. damages for the trespass up to the date of the hearing, but refused to grant an injunction. The plaintiff appealed and the defendants cross-appealed:—

Held, dismissing the appeal (Lord Evershed M.R., Willmer L.J. and Cassels J.) (1) that a proprietor of land was not debarred from asserting his legal right against one who was shown to have infringed it on the ground of acquiescence, unless it was clear that at the time he acquiesced he was aware of his proprietary right and, accordingly, that there was no equity which barred the plaintiff from asserting his legal title.

Ramsden v. *Dyson* (1866) L.R. 1 H.L. 129 and *Willmott* v. *Barber* (1880) 15 Ch.D. 96 applied.

(2) That if a man, having a proprietary right, proved an infringement of it, prima facie, he was entitled to an injunction, but that was not an unqualified right and grounds for denying an injunction were (a) that the wrong done, in the circumstances, was trivial, and (b) that he not only misled the defendants but attempted to mislead the court, and that, on the facts, the plaintiff had not proved any damage and should not be granted an injunction.

Imperial Gas Light and Coke Co. (Directors) v. *Broadbent* (1859) 7 H.L.Cas. 600 applied.

Held, dismissing the cross-appeal (Lord Evershed M.R., Ormerod and Willmer L.JJ.): (1) that if A gives authority to B for the doing of an act on his land, and the act is done and completed, then whatever be the description of the authority, it is generally too late for A to complain and, accordingly, that the plaintiff could not complain of the sewer which had been constructed on his land.

Wood v. *Leadbitter* (1845) 13 M. & W. 838; *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331; *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 considered.

(2) That a right to pass water through another's land was an interest in land and was incapable of being granted by parol.

(3) That an oral licence to pass water through another's land to be irrevocable during the licensor's tenure of the land must have the necessary qualities of a contract and be binding on the parties, and be supported by consideration, and that there being no consideration for the licence granted by the plaintiff to the defendants, the plaintiff was entitled to revoke the licence and, on the facts, the licence had been revoked.

APPEAL AND CROSS-APPEAL from Judge Hargreaves sitting at Willesden County Court.

The appeal was heard by Lord Evershed M.R., Willmer L.J. and Cassels J., and the cross-appeal was heard by Lord Evershed M.R., Ormerod and Willmer L.JJ.

The plaintiff, Henry Albert Armstrong, was the registered proprietor with an absolute title of No. 2, Priory Close, Wembley. Included in his title at the rear of the premises was a strip of land used as a pathway. The defendants, Sheppard & Short Ltd., entered on the pathway and constructed on it a sewer and a manhole which they used for passing sewage and effluent from their own premises.

In these proceedings the plaintiff claimed damages for the entry on his land and the construction of the manhole and an injunction to restrain the defendants passing sewage and effluent through the sewer. The defendants relied on an oral licence granted by the plaintiff to the defendants to construct the sewer and manhole.

The county court judge found, as a fact, that the defendants had informed the plaintiff of the work which they proposed to do and that he had acquiesced in their doing it, but that, when the plaintiff did so acquiesce, he was not aware that he was the owner of the strip of land in question. The judge held that no actual damage to the plaintiff's land had been proved. He held that there was a trespass and awarded to the plaintiff 20s. nominal damages but he refused an injunction. The judgment of the county court judge is fully stated in that of Lord Evershed M.R.

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The plaintiff appealed on the ground that the damages awarded were insufficient and that the judge was wrong in holding that the plaintiff was debarred by acquiescence from the remedy of an injunction, and in holding that to grant an injunction would be oppressive. The defendants cross-appealed claiming that on the facts found they were entitled to judgment.

D. Gidley Scott for the plaintiff. The plaintiff should not be deprived of his prima facie right to an injunction, because he did not know at the material time that he was the owner of the land and, therefore, he could not have given permission. He is not asking for a mandatory injunction but merely that the defendants should be restrained from continuing to discharge effluent through the sewer. The equitable remedy of an injunction is not barred by acquiescence, unless it is shown that the party alleged to have acquiesced in fact knew of his proprietary rights at the material time: *Ramsden* v. *Dyson.*[1] Actual knowledge is necessary (*Willmott* v. *Barber*[2]) and his conduct must have been such as to make it a fraud on his part to require the cessation by the other party of that which he permitted. The damage suffered is not merely trivial. By agreement with the owners of the rest of the passageway, he could formerly have built on the land. Further, the manhole cover is a potential liability if it is not maintained properly and third parties are injured. This is an interference with the plaintiff's legal rights and the mere fact of the discharge is a continuing nuisance.

This is not a case for the granting of damages in lieu of an injunction: *Shelfer* v. *City of London Electric Lighting Co.*[3] It is admittedly rare for the Court of Appeal to interfere with the exercise of the judge's discretion in a matter of damages, but it is submitted that his approach was wrong. The proper approach to this question was from the standpoint that the plaintiff, having established his legal right and the fact that it had been violated, was prima facie entitled to the relief sought (*Imperial Gas Light and Coke Co.* (*Directors*) v. *Broadbent*[4]), and then the judge should have proceeded to consider whether there was anything which disentitled the plaintiff: *Cowper* v. *Laidler.*[5] The telephone inquiry by the defendants was evidently casual and insufficient to put him on inquiry as to his rights.

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[1] (1866) L.R. 1 H.L. 129.
[2] (1880) 15 Ch.D. 96.
[3] [1895] 1 Ch. 287; 11 T.L.R. 137.
[4] (1859) 7 H.L.C. 600.
[5] [1903] 2 Ch. 337.

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[LORD EVERSHED M.R. There is no suggestion that the defendants thought that the passage was theirs. If they had asserted a claim as of right, the real owner might not have been barred if he had not objected.]

[WILLMER L.J. This was really an innocent misrepresentation by the plaintiff.]

The defendants were only misled to the extent that they believed that they had permission, not that they had been given permission by someone who was entitled to give it. [Reference was made to *Goodson* v. *Richardson.*[6]]

E. Anthony Machin for the defendants. It is not suggested that the plaintiff is debarred from all remedy, but merely that it would be inequitable to grant an injunction. The defendants submit that they have not committed any trespass because the occupier, who was in fact in a position to give permission, said that he did not object. He cannot subsequently say that he had forgotten that he was the owner at that time. The plaintiff says that the defendants' occupation is unlawful, but if the occupier gives permission to put in a sewer and, in reliance on that permission, work is done, the licence becomes irrevocable: *Liggins* v. *Inge.*[7] It cannot be said that although what the plaintiff said prevented the installation of the sewer pipes from being a nuisance, yet the later continued use caused a nuisance. The consent was to put in something on land with the sole and apparent purpose of user. The plaintiff knew that the pipes were going to be used over a long period and he cannot contend that that user is unlawful. This has nothing to do with equitable principles. At common law the plaintiff gave permission for construction and user. As the judge did not allocate the award of damages to any specific matter, one must assume that it was attributable to all the heads of claim.

[LORD EVERSHED M.R. On any future dealing with the land the right of drainage would have to be reserved to the defendants, so that to that extent the plaintiff's title is qualified.]

If the claim had been for damages, they could have been quantified. Expert evidence could have been called as to what would have been the purchase price of the easement. If such evidence had been called, then the judge would have rightly based the damages on that estimate, but the plaintiff did not make any claim for diminution in the value of the land, and in view of that, he is entitled to nominal damages only. It is not conceded that there is any trespass.

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[6] (1874) L.R. 9 Ch. 221.

[7] (1831) 7 Bing. 682.

There are two stages in the argument. First, whether at common law the construction of the sewer was a trespass, and, only if it was, can the second question whether there was a continuing trespass arise. The construction only becomes unlawful if the licence was revocable and has been revoked. The plaintiff has not submitted that it has been revoked.

[LORD EVERSHED M.R. The defendants have not pleaded that the plaintiff gave permission to discharge the sewage through the land. The consent has not to be merely personal to the defendants.]

The plaintiff is suing in trespass. The defendants do not have to show that their right is binding on third parties. They have only to show a right in personam against the defendants. The equity only arises if there is no right at common law. It is not necessary to rely on *Willmott* v. *Barber*.[8] That was a case of mere inaction, but here the plaintiff has done a positive act and granted a licence. The licence was to put something on this land of a permanent nature; it was a licence coupled with a grant and was irrevocable. The rule about knowledge is not material, though it would produce the same result, because the plaintiff evidently supposed that he had some right in the land. If the landowner leads someone reasonably to suppose that he has no objection to entry, then entry does not become unlawful merely because the owner does not know that he is the owner. The plaintiff held himself out as being entitled to give or to withhold permission. The mistake was not induced by the defendants. There is no direct authority on this point, but it is common sense and consorts with the general rule. [Reference was made to Salmond on Torts, 12th ed., p. 46.] There was, admittedly, no consideration, but this is a licence—not a contract.

Argument on the appeal having closed on May 8, on May 12 and 13 the reconstituted court, consisting of Lord Evershed M.R., Ormerod and Willmer L.JJ., proceeded to hear argument on the defendants' cross-appeal. By their cross-appeal the defendants asked the court to reverse the judgment against them for £1 and costs and to enter judgment for the defendants.

E. Anthony Machin for the defendants. The judge has found that the plaintiff knew that the defendants were constructing this sewer and manhole on his land but that he did not know, when he did not object, that the land was in fact his. In those circumstances the judge held that the defendants' conduct was a trespass but refused to grant an injunction. Two questions are raised by the cross-appeal: first, did the defendants' works in the circumstances constitute a trespass at all; secondly, was the licence which the plaintiff granted to the defendants a revocable licence.

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[8] 15 Ch.D. 96.

The fact that the plaintiff had forgotten that this strip of land was his does not affect the legal position. It is submitted that where the owner of land makes it clear that he has no objection to some third person constructing works on his land, the owner cannot subsequently turn round, when he finds that the land is his, and treat such third person as a trespasser. Given the fact that the initial construction of this manhole and sewer was lawful, their use for the purpose for which they were constructed is also lawful.

It is submitted that the following proposition accurately sets out the position at common law where a landowner, in ignorance of his own title, grants a licence to enter on it: A licence to enter on land and to construct works of a permanent nature becomes irrevocable as between the licensor and the licensee when the works have been completed, although there was no consideration given for the grant of the licence. The irrevocable licence so granted extends not only to the continued presence of the works on the land but also to all acts done by the licensee which constitute a normal use of such works. If it is correct that ignorance of his rights does not prevent a man's consent being effective, then no entry made pursuant to that consent can be a trespass.

The question is whether it was legally possible to create an irrevocable licence. If the licence to construct the sewer was irrevocable, then the licence must authorise the user of the sewer. It is submitted: (1) that it is competent for a landowner to grant, without consideration, an irrevocable licence for the construction of something on his land. In *Webb* v. *Paternoster*[9] a licence to stack hay was held to be binding on the licensor's assigns. Once the landowner has granted the licence, he cannot change his mind: *Wood* v. *Lake.*[10] In *Winter* v. *Brockwell*[11] the defendant had been authorised to nail a skylight to the plaintiff's wall and it was held that the plaintiff could not revoke the licence. There no equitable principle could have been applied and no question of consideration arose. In *Tayler* v. *Waters* [12] there was consideration. In *Hewlins* v. *Shippam* [13] the action was between the successors in title of the parties to the original arrangement and an interest in the land had to be shown. The defendants do not contend here that the licence granted by the plaintiff would bind the plaintiff's successors in title. The strongest case against the defendants is *Wallis* v. *Harrison*.[14] It illustrates the difference between a licence which is executory and one which is executed. [Reference was made to *Wood* v. *Manley*.[15]] The principle to be applied is similar to the rule that a man shall not derogate from his grant.

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[9] (1619) 2 Roll.Rep. 143; Palmer 71.

[10] (1751) Sayer 3.

[11] (1807) 8 East 308.

In *Wood* v. *Leadbitter* [16] the question of the effect of an executed licence was not material for consideration. If a licence has been executed by the erection of works, the defendants contend that it thereupon becomes irrevocable. In *Liggins* v. *Inge* [17] there was an oral release of a right, which was held to bind the releasor after it had been acted upon.

It is admitted that, since the plaintiff was not aware of his legal rights, no equity is raised against him. It is contended that there are three exceptions to the doctrine that licences are revocable: (1) The licence may be a defence to an action for trespass: *Winter* v. *Brockwell*.[18] (2) The licence is not revocable at the will of the licensor, unless the licensee can be restored to the position in which he was before the licence was granted: *Winter Garden Theatre* (*London*) *Ltd.* v. *Millennium Productions Ltd.*[19] (3) There is the doctrine enunciated by Denning L.J., as he then was, in *Bendall* v. *McWhirter* [20] that at common law a contractual licence to use land once acted upon is not revocable. If this licence is held to be revocable on the facts, it would only be determined after a reasonable time by notice: *Canadian Pacific Railway Co.* v. *The King*.[21] On the facts, the plaintiff did not give reasonable notice of determination to the defendants.

D. Gidley Scott for the plaintiff. The first question is whether the defendants' entry was unlawful. It is submitted that in the case of a contractual licence the licensor must address his mind to what he is authorising. The parties must be ad idem. In the case of a gratuitous licence the licensor must know what he is being asked to license. The defendants' first submission is wrong in law. Here the actions of the defendants amounted to a trespass.

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[12] (1816) 7 Taunt. 374.

[13] (1826) 5 B. & C. 221.

[14] (1838) 4 M. & W. 538.

[15] (1839) 11 Ad. & El. 34.

[16] (1845) 13 M. & W. 838.

[17] 7 Bing. 682.

[18] 8 East 308.

[19] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

[20] [1952] 2 Q.B. 466, 479; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

[21] [1931] A.C. 414.

Secondly, on the facts, the judge found that the plaintiff did not give permission to construct works on his land as owner of it but he merely did not object as a person not entitled to object. What the plaintiff did was not sufficient to amount to a licence.

Lastly, if the defendants have established a licence to construct the sewer, they must go further and show that the licence extended to the use of the sewer which was constructed. That has not been done. There is a trespass here because the passage of water over the land would itself constitute a trespass.

The plaintiff's letter of August 28, 1958, was a valid revocation of the licence. [Reference was made to Salmond on Torts, 12th ed., ch. 5, sect. 60.] Reasonable notice was given and, since this was a gratuitous licence, it was revocable and was in fact revoked.

LORD EVERSHED M.R. This appeal and cross-appeal have taken an unusual course, owing to the necessary change in the constitution of the court after the hearing of the appeal. I hope that the result has not increased the difficulties or the costs of the parties.

The case has certainly not been without interest or without difficulty. The facts (and I am now dealing with the appeal) are, briefly, these: the plaintiff is the owner and occupier of certain premises known as 2, Priory Close, Harrow Road, Wembley. The plaintiff has charged his interest by way of mortgage; and the significance of that fact is that the documents of title, which he might have held at the relevant time, were, naturally enough, in the possession of the chargee.

The registered plan shows that the plaintiff's house is at the extreme end of Priory Close—that is, where Priory Close goes into Priory Avenue. At the back of the plaintiff's house is a pathway, or roadway, made up, not being a public highway. That roadway goes at the back of a number of houses, and leads to premises now owned and occupied by the defendants, Sheppard & Short Ltd. But the little strip of that pathway which (so to say) matches the plaintiff's house and garden is at the end of that passage nearest to Priory Avenue.

At the end of 1957 the defendants conceived the idea that it would be to their advantage to construct a drain, or sewer, from their premises, leading to the public sewer in Priory Avenue. The drain was not required to carry any great quantity of foul water. The defendants were concerned only with, I believe, one water closet and one urinal; but they also wished to carry away the storm water, which would collect on their building, in the same manner to the sewer in Priory Avenue. They constructed, accordingly, a manhole and made the necessary excavations for the sewer; and they also constructed the sewer. The manhole is in fact situated on the little strip, which belonged—and belongs—to the plaintiff, being the strip at the extreme end of the passageway nearest to Priory Avenue. The work was concluded by the end of 1957; thereafter, the defendants passed the foul and storm water down this drain into the public sewer in Priory Avenue.

On August 20, 1958, the plaintiff, through his solicitors, wrote to the solicitors for the defendants a letter which was as follows: "Our client [the plaintiff] further instructs us that he has at "no time been approached by your clients for permission or been "advised of their intention, and has given no permission or "licence of any kind. We write on behalf of our client to require "that the sewer and manhole be removed forthwith from his "premises, the premises be made good, and our client com-"pensated in damages for the trespass. Alternatively, our client "will have no alternative but to take such steps as may be "necessary to stop the unauthorised flow of effluent across his "land."

The reply denied the assertion that no permission of any kind had been given. But unfortunately that was not satisfactory to the plaintiff; and the present proceedings were begun in October of 1958. The particulars of claim alleged that the plaintiff was at all material times the registered proprietor of 2, Priory Close; that on or about December 6 the defendant wrongfully entered and excavated part of his land and constructed a sewer and manhole; and thirdly that since January 1958 the defendants have discharged or caused or permitted to be discharged effluent through the sewer under the land. The plaintiff claimed damages for trespass (but limited to the sum of £400); and he also claimed an injunction against the further discharge of effluent through or under the plaintiff's land.

The matter came on for trial in December 1958, a year after the entry complained of. It is quite plain from the evidence given by the plaintiff that he continued to assert that he had never given any assent or permission to or for what the defendants had done. According to the judge's note: "I have never "given consent for the manhole and I had no knowledge it was "to be built. I did notice it being done on two or three occasions. "On the first the construction of it was well on the way. I "did nothing at all about it. I was not approached by anyone "for consent." I must say in clear and unqualified terms that that evidence was false, according to the judge's finding. The judge held, after hearing the evidence—and in particular the evidence of the representative for the defendants, one Sheppard—that there had been clear permission or assent given to what was being done. Sheppard described the interview with a little detail. He said that the plaintiff pointed out that he was in the business himself of a sanitary engineer, which took him all over the country, and he fully understood the defendants' difficulty. It must, however, be conceded that the defendants were somewhat rash over this matter. They had first made a mistake, apparently, in supposing that one Neilson was the owner of the whole of the relevant property. No doubt that mistake put them in a difficulty. They had to see, and according to the evidence saw, a number of house-owners whose properties back on to this strip; but they were content—rashly, as I have ventured to say—to leave it on the footing that they supposed that they had been properly authorised, by all the persons interested, to construct the sewer and to pass this effluent down it. The judge found that they were justified in supposing that, so far as the plaintiff was concerned, he knew what his rights and position were and had deliberately consented to what the defendants were doing. The plaintiff, however, though baulked in his attempt to establish that he had never spoken to anybody about it, did also give evidence of the fact that, at the time when this was going on and when (as eventually was found) he did give his assent to the defendants, he was unaware that he had any proprietary right in respect of this strip—he did not in fact, apparently, use it himself—and therefore he must be taken to have been unaware that he had any interest or concern which was involved when his permission was asked or that he could refuse his consent or qualify it.

The part of the judge's judgment dealing with that is as follows: "I accept the defendant's evidence that there was a "telephone conversation between him and the plaintiff, I accept "the defendant's evidence that he understood the plaintiff to "have given him permission to go ahead with the work of constructing the sewer, but I also accept the plaintiff's evidence "that he did not give the defendant such permission. My "reason for both conclusions is the same, that the plaintiff, not "having seen the deeds of his property for some time and forgetting the contents of the deeds and the exact boundary of the "plan, did not realise when he spoke to the defendant that he, the "plaintiff, was the owner of any part of the said pathway; this "being so he would naturally not give permission to the defendant, because he did not know he had the right to do so, neither "however would he object, because he would not know he had the "right to object either. Consequently, I feel safe in taking the "view that the plaintiff is right in saying that he never actually "gave permission for the sewer to be constructed, but that the "defendant is correct in saying that the plaintiff made it clear, "whatever words he used, that he was not objecting to it."

To some extent the distinction is one more of words than of substance. But it is clear, I think, that what the judge meant was that the plaintiff did not give permission, in the sense that he did not purport, qua owner, to give authority or a licence to the defendants to do something on his land: on the other hand, the judge found that the plaintiff did make it quite clear—and that the defendants were perfectly well justified in so assuming—that he was raising no kind of objection to the proposed course of construction. In those circumstances, the judge at the trial declined to grant any injunction, either to remove the manhole or to restrain the effluent being sent down. He also held that the damage suffered from the trespass which, on the view that the judge took, he thought must technically have been committed, was purely nominal. He therefore said: "Taking the "view, as I do, that it is reasonable for the plaintiff to desire that "his position should be clarified, I award him costs on Scale II."

By the notice of appeal the plaintiff contended that the judge should have granted an injunction—that is to say, an injunction (as I understand it) in the terms of his claim, to restrain the discharge of the effluent down the sewer; and the short basis of the case made for an injunction was this: A proprietor who establishes a proprietary right is ex debito justitiae entitled to an injunction, unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary title. In this case (said Mr. Scott) it is of the essence of the judge's finding that the plaintiff did not know that he had the proprietary right, which would be affected by the suggested licence, and, therefore, no such equity is raised against him which will deprive him of his prima facie right to an injunction. Further, the appellant-plaintiff said that 20s., which was derisory damages, was quite inadequate by way of compensation for the interference with the plaintiff's proprietary right.

We heard the argument upon that appeal, the court being constituted by myself, Willmer L.J. and Cassels J.; and the argument upon that appeal was concluded. Cassels J. was unable to sit further, and so the court was reconstituted: and Ormerod L.J. joined Willmer L.J. and myself for the purpose of hearing the cross-appeal—the substance of the cross-appeal being that, in the circumstances and for reasons which will be dealt with when I deal with the cross-appeal, the judge should have dismissed the plaintiff's action altogether. Owing to this change in the composition of the court, it is necessary in this case to distinguish clearly between the appeal and the cross-appeal; and, in order to remove possible doubts, I thought it might help if I wrote a statement of the points raised and submitted it to the counsel in the case for approval. They were good enough to say that they did approve it; and it may be worth while my incorporating in this judgment the statement which I made. It is as follows:

"On the appeal Mr. Scott contended: (a) that the judge "should have granted the injunction prayed, and (b) that the "damages awarded (that is, nominal damages of 20s.) were too "low. On the appeal the court [myself, Willmer L.J. and Cassels "J.] have intimated their rejection of the appeal, but have "treated the damages awarded as referable to the entry and "excavation or (at most) to the alleged trespass up to the date "of the hearing.

"On the cross-appeal Mr. Machin contends that the action "should have been dismissed on the ground that the 'approval' "given by the plaintiff, as found by the judge, prevents him "complaining that the acts of entry and excavation (and any "other acts covered by the award of 20s. damages—see above) "were trespasses: and he [the plaintiff] further contends that "such 'approval' also prevents him (personally) complaining of "any use of the pipes laid by the defendants for the (obvious) "purpose for which they were laid. Mr. Machin concedes that, "unless he is right on his wider contention, the plaintiff may "bring fresh proceedings founded on trespass or may himself "interfere with the manhole and pipes. Mr. Machin further "concedes (for present purposes) that the plaintiff's 'approval' "does not extend in effect to the plaintiff's successors in title.

"The question, therefore, to be debated on the cross-appeal "is whether, on the facts proved or found, the effect of the "plaintiff's 'approval' is to prevent him personally complaining "(on the ground of trespass) of the defendants' acts in entering "on and excavating the land and installing the pipes and man-"hole and also in using the manhole and pipes in the ordinary "course for the purposes for which they were installed."

For the present purposes, the most important sentence is: that it has been accepted by the court that the damages awarded in the action must be treated as referable, and referable only, to the entry and excavation or (at most) to any alleged trespass (by discharge of effluent) up to the date of the summons, or the date of the hearing.

I now, therefore, come back to give the reasons for the conclusion which I have earlier indicated (as that note shows) that the appeal fails. Mr. Scott's proposition in general must, I think, be accepted. First, it is true to say that a proprietor will not be debarred from asserting his legal right, against one who is shown to have infringed it, on the ground of acquiescence, unless it is also clear that, at the time he did so acquiesce, the proprietor was aware of his proprietary rights. There is substantial authority for that view, such as the well-known case of *Ramsden* v. *Dyson* [1] and the judgment of Fry J. in *Willmott* v. *Barber*.[2] It is, therefore, in the present case, well said by Mr. Scott that the absence of essential knowledge, as found by the judge, in December 1957, prevents the erection against him of an equity which would bar the plaintiff from asserting for any purpose his legal title. Second, it is true to say that if a man, having a proprietary right, proves an infringement of that right, prima facie he is entitled to an injunction: but that needs some qualification. It is not a matter of unqualified right; and one ground for denying an injunction would be that the wrong done is, in the circumstances, trivial. That proposition is founded on the well-known case of *Imperial Gas Light and Coke Co. (Directors)* v. *Broadbent* [3]: but I can summarise it by reading

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[1] (1866) L.R. 1 H.L. 129.

[2] (1880) 15 Ch.D. 96.

[3] (1859) 7 H.L.C. 600.

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from Kerr on Injunctions, 6th ed., p. 30: "After the establishment of his legal right and of the fact of its violation, a plaintiff is in general entitled as of course to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case, such as laches, or where the interference with the plaintiff's right is trivial."

The judge was here dealing with the claim as I have formulated it; and he came to the conclusion that the circumstances of this case were special, and, as his judgment shows, that the damage was trivial. For the latter statement he was supported by the plaintiff himself, who said in evidence that he had suffered no inconvenience himself whatever from what had been done. But there were other good grounds, and formidable grounds (as I think), for refusing the plaintiff an injunction. That he misled the defendants is beyond a peradventure. It is no less clear that he attempted to mislead the court. He asserted—contrary to the fact—that he had never had any conversation with the defendants about the matter at all; and in his evidence in chief he so swore, untruly. It is not, therefore, at all surprising that the judge came to the conclusion that he should grant no equitable relief; and in my judgment, on the facts of this case, he was well entitled to take that view. Nor, on the evidence, does it seem to me that the plaintiff can complain of the award of 20s. damages. He proved none. He said that he had suffered no inconvenience whatever; and it is only necessary to have some comprehension of the circumstances and facts to realise that he could not have suffered the slightest inconvenience—all the more since, as he says, he never uses this pathway at all.

But there is one matter which clearly was not dealt with. Passing the effluent down the sewer, as distinct from the work of construction, does involve (and I am now approaching a point which must be dealt with more fully on the cross-appeal) something (as I think) which is in the nature of a proprietary interest, in the nature of an easement—a right to pass effluent under somebody's land; and if it is a right in respect of which the plaintiff's land must become (so to speak) a servient tenement, then I think a case might well have been put for saying (under Lord Cairns' Act) that there should be an award of monetary compensation referable to the qualification which would thereby be imposed upon the title of the plaintiff as absolute owner. But it is quite clear that the judge was not invited to consider Lord

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Cairns' Act. As I have said, the damage (as has been agreed before us) must be treated as having been limited to the technical trespasses, such as they were—that is to say, assuming that the cross-appeal did not succeed, the excavations and discharge up to the hearing.

The result, therefore, is that the appeal fails. Mr. Scott has not persuaded me that he is entitled to an injunction, and he has not persuaded me that there is anything wholly wrong with the award of damages as compensation for the alleged trespasses up to the date of the hearing. It follows, therefore, that the appeal should be dismissed: and I have been authorised by Cassels J. to say that he agrees with the conclusion which I have stated, and with my reasons.

WILLMER L.J. I also agree that the appeal should be dismissed, for the reasons stated by my Lord; and I do not desire to add anything further on the appeal.

LORD EVERSHED M.R. I now proceed to deal with the cross-appeal. I have indicated that its purpose was that the action should have been dismissed. The form of the notice given was: " . . . the respondent desires to contend that the judgment " should in any event be reversed . . . so far as it directs that " there should be judgment for the plaintiff for £1 with costs. " . . . And . . . the respondent proposes to ask the Court of " Appeal to enter judgment for the defendants "—that is to say, that the action should be dismissed altogether.

I shall treat as incorporated also in this judgment the memorandum which I gave to counsel and with which they agreed, because it states what was the point which Mr. Machin has put with great care before us, having indeed obviously devoted much industry to it. His point was shortly this—and I hope I express it properly. He said: " I am only concerned to resist an action " for common law trespass: if, therefore, I can establish that " the subject-matter of which the plaintiff complains was not " without lawful justification, that is an answer to the plaintiff's " action; and I say that that of which the plaintiff complains " had lawful justification, for the plaintiff himself approved it: " he approved the entry on his land for the purpose of excavating " that land and inserting a sewer and a manhole, and particu- " larly, since the plaintiff appeared himself to be in the same " line of business, he certainly must have supposed that the pipe " was not put into the land merely for the fun of it but was put "there in order that effluent of some kind could be passed "through it." He goes further and says that, in truth, the plaintiff would know exactly what the whole purpose of the operation was: it therefore cannot be said by the plaintiff that the entry and excavation, and the natural consequences and intended consequences of it, were, and are, without justification: and that that is an answer to an action for trespass. Mr. Machin has not contended that, if he is right, he can do other than answer an action brought by the plaintiff. If and when the plaintiff were to sell his property he would not suggest that the buyer would be affected by the permission, authority—whatever the right word is—which the plaintiff gave. But he does say that the plaintiff, having authorised what the defendants did, and having therefore authorised the obvious and intended consequences, cannot complain at common law.

There is much attraction in the argument, particularly on the facts found; and it is not easy to put out of one's mind that the plaintiff said that he never knew anything about it at all. In support of the argument Mr. Machin has taken us through a series of cases, beginning with that of *Webb* v. *Paternoster*.[4] We looked at that case and at later cases which I will just mention: *Wood* v. *Lake*[5]; *Winter* v. *Brockwell*[6]; *Tayler* v. *Waters*[7]; *Hewlins* v. *Shippam*[8]; *Wallis* v. *Harrison*[9]; *Wood* v. *Manley*[10]; down to the well-known and classic case of *Wood* v. *Leadbitter*[11]; and finally at the recent case of *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.*[12]; and at a dictum of Denning L.J. in *Bendall* v. *McWhirter*.[13]

It is, I think, true to say (and these cases establish it) that if A gives authority to B for the doing of an act on A's land, and the act is done and completed, then, whatever be the strict description of the authority, whether it be called a permission or a licence, it is, generally speaking at any rate, too late for A, who gave the authority, to complain of it. And that will go to this extent—that a man may by such means extinguish a proprietary right: for example (to quote an instance from the cases), if I, having an easement of light, permit another to come and build a wall up against my window, so as to extinguish the easement, if the wall is built and completed, that may well be the end of it, and I cannot complain of the infringement of my ancient light or require the wall to be taken down.

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[4] (1619) 2 Roll.Rep. 143; Palmer 71.

[5] (1751) Sayer 3.

[6] (1807) 8 East 308.

[7] (1816) 7 Taunt. 374.

[8] (1826) 5 B. & C. 221.

[9] (1838) 4 M. & W. 538.

[10] (1839) 11 A. & E. 34.

[11] (1845) 13 M. & W. 838.

[12] [1948] A.C. 173; 63 T.L.R. 529; [1947] 2 All E.R. 331.

[13] [1952] 2 Q.B. 466, 479; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.

The effect of these cases was for this purpose sufficiently well stated in Gale on Easements, 11th ed., p. 67. After a very full discussion of the cases to which Mr. Machin referred us, it is stated: " The result of the common law authorities above referred " to was thus in effect stated by Mr. Gale: ' A man may in some " ' cases by parol licence relinquish a right which he has acquired " ' in addition to the ordinary rights of property and thus restore " ' his own and his neighbour's property to their original and " ' natural condition.' " That is obviously a reference to another case, to which Mr. Machin drew our attention, of *Liggins* v. *Inge*.[14] In that case, a man approved a neighbour's so altering an embankment to a watercourse that the water, which had formerly flowed to the plaintiff's mill, was diverted to the defendant's property. The actual doing of the work was no trespass, for the bank was wholly on the defendant's property: but the point is that once the work had been done, then the consequence followed that a previously enjoyed right of receiving water had been pro tanto lost—just as, if you allow another to build against your window, you may lose an ancient right of light. But I observe that in these cases (so far as I can see) it is always assumed that the plaintiff giving the licence knew what his real rights were.

I continue to read from Gale: " ' But he cannot by such " ' means impose any burden on land in derogation of such " ' ordinary rights of property.' Thus, a parol licence given by " B, the owner of land (the servient tenement), to A, the owner " of a neighbouring house (the dominant tenement), to turn a " spout of water from the house on to the land, will be revocable. " On the other hand, supposing in such a case the house to " contain ancient windows, a parol licence given by A to B to " build a wall on B's land in front of A's ancient windows will " be irrevocable once the wall has been built. It would seem, " however, that, in order that a parol licence should so operate, " the act licensed should be executed, and the necessary consequence of such execution should be per se the extinguishment " of the right to light. For the cases do not appear to furnish " any authority for saying that where the extinguishment of an

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[14] (1831) 7 Bing. 682.

"easement would depend upon a repetition of the licensed acts, "a parol licence would be sufficient to effect it. Indeed, where "the acts from their nature lie in repetition such licence could "not be executed." And I would add that that statement finds later support, I think, in the speeches of Lord Simon and Lord Porter (to which Mr. Scott referred us) in the *Winter Garden* case.[15]

If that is a right summary, it follows that Mr. Machin is entitled to say that the plaintiff cannot complain of the alleged trespass consisting of the defendants' acts of entry upon his land in December, 1957, making holes in it and putting a sewer and a manhole in it; and I agree with him that, in an action of common law trespass, it does not, in the circumstances here, matter that the plaintiff was unaware of his proprietary rights when he gave permission: the thing is done: and it has had the lawful justification (in so far as this case is concerned) that it was done with the approval of the man who now tries to complain about it. It follows from that conclusion (as Mr. Scott conceded) that Mr. Scott's client cannot complain of the presence in the land now of the physical things, the manhole and pipes: indeed, they belong (as Mr. Machin concedes) in law to the plaintiff, there having been no agreement or arrangement made which would alter the ordinary consequence that that which is put into a man's land becomes part of that man's property.

But that only goes to deal with the matter of the original entry and the physical things, the manhole and sewer. What of the passage of water—effluent—which is the subject of paragraph 3 of the particulars of claim? Unless Mr. Machin can satisfy us that he can also find an answer to the allegation of trespass by means of the discharge of effluent, then he cannot succeed, as it seems to me, in disposing of the award of 20s. damages and the consequences as regards costs in the action. He cannot, in other words, invite us to set aside the judge's judgment and dismiss the action.

In my judgment, Mr. Machin cannot succeed on this part of his case. It seems to me, after this review of the authorities, that two propositions stand forth. First, if the subject-matter, which is alleged to have been granted, is an interest in land, then it cannot be done by parol only. Of course, a licence coupled with a grant, if it is effectively done, will no doubt be irrevocable.

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[15] [1948] A.C. 173.

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v.
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M.R.

But there is nothing in the authorities that Mr. Machin cited to support the view that a right to pass water through another's land—which is, as I conceive, a proprietary right—is capable of grant by parol. But, secondly, such a permission to pass effluent down a man's land no doubt might be, as a matter of contract, properly covered as between one individual and another; and indeed it is upon that part of it that perhaps Mr. Machin concentrated: for he said that he was only concerned to show that the plaintiff in this case, by the permission which he gave, and albeit that he did not know what his interest was, himself had given an irrevocable licence during his own tenure to the defendants. In my judgment, the answer to that argument is that a licence of that kind, if it is to be irrevocable during the plaintiff's tenure, must have the necessary qualities of a contract, binding upon the parties: it must be supported by consideration, and must in other respects be the subject of a contract. There was, I think, clearly no consideration for the alleged irrevocable licence to pass effluent under the plaintiff's land—and, indeed, Mr. Machin has not so contended. He has not, in truth, contended that the licence he invokes rests in contract at all: he has said that it was a mere gratuitous licence, but that, in the circumstances, it was, during the plaintiff's tenure, irrevocable. In my judgment, that is not well founded.

Mr. Machin then fell back upon this—that assuming that it was a gratuitous licence and was revocable, then at any rate by well-established principle the licensee does not become necessarily a trespasser the moment the licensor says "The licence "is at an end": the alleged trespasser is allowed a reasonable time to remove or make other arrangements to discontinue the act which thereby would become a trespass. I read as part of my judgment on the appeal the letter of the plaintiff's solicitors dated August 20, 1958. For present purposes it is clear that it would constitute a revocation of the licence. It is true that it is not expressed in that way. Nor does it refer to any limit of time at the end of which the effluent must cease to be discharged. But Mr. Scott satisfied me that that is not necessary in determining a revocable licence. In truth, I have no doubt that there was time, between August 20 and the proceedings in October, and certainly by the time the hearing came on, for the defendants, if they had been so minded, to make some other arrangement.

It follows, therefore, that upon this narrow point—as it really is—to which this cross-appeal is directed, Mr. Machin cannot go far enough to show that there was no common law wrong which the judge could compensate by an award of 20s. damages. It follows (in other words) that the cross-appeal, like the appeal, must also fail.

ORMEROD L.J. I agree, and I have nothing to add.

WILLMER L.J. I also agree that the cross-appeal should be dismissed.

Appeal dismissed with costs.
Cross-appeal dismissed with costs.

Solicitors: *W. J. Fraser & Son; J. Tickle & Co.*

B. A. B.

GAYNOR *v.* ALLEN.

1959
May 27.

McNair J.

[1958 G. 1400.]

Road Traffic—Negligence—Speed limit—Police motor-cyclist—Speed limit exceeded—Driving in course of duty—Pedestrian knocked down—Civil liability—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 3.

At about 7.20 p.m., some 20 minutes after lighting-up time, the plaintiff, while crossing a road subject to a 40-mile an hour speed limit, was knocked down by a police motor-cyclist driving at 60 miles an hour in the course of his duties. The policeman was killed and the plaintiff claimed damages for personal injuries against his administratrix, alleging negligence. In view of section 3 of the Road Traffic Act, 1934,[1] the policeman was exempted from observing the speed limit and it was submitted on behalf of the defendant, who denied negligence, that the fact that the policeman was driving at 60 miles an hour on a restricted road did not prima facie show negligence:—

Held, that in respect of his civil liability the police motor-cyclist was in exactly the same position as any "civilian" driver, and on the occasion in question owed the same duty to the public

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[1] Road Traffic Act, 1934, s. 3: "The provisions of any enactment, or "of any statutory rule or order, im-"posing a speed limit on motor "vehicles shall not apply to any "vehicle on an occasion when it is "being used for fire brigade, ambu-"lance or police purposes, if the "observance of those provisions would "be likely to hinder the use of the "vehicle for the purpose for which it "is being used on that occasion."

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to drive with due care and attention and without exposing members of the public to unnecessary danger; in the circumstances, the policeman was negligent and was two-thirds to blame for the accident.

Action.

The plaintiff, Susan Gaynor, a state registered nurse, claimed damages against the defendant, Anne Patricia Allen, as administratrix of Edgar Gerald Allen, for personal injuries incurred when, on March 29, 1958, as a pedestrian she was attempting to cross the Great West Road at Hammersmith near the junction with Eyot Gardens and was knocked down by a police Triumph 500 c.c. motor-cycle, driven by a police officer, Edgar Gerald Allen, in the course of his duties. The police officer was killed.

The plaintiff, at the material time, lived in Eyot Gardens, a suburban road which joined the Great West Road between Hammersmith and Chiswick. It was her custom every day, in going to the hospital where she worked, to cross the Great West Road from Eyot Gardens into North Eyot Gardens, which involved crossing a dual carriageway of two roads some 30 feet wide, divided by a centre division some four or five feet wide, consisting of grass and in part railings. It was a crossing with which she was well familiar, having crossed it at least twice a day for some months. On March 29, at about 7.20 p.m., which was some 20 minutes after lighting-up time, the plaintiff, returning from the hospital, came to the Great West Road, intending to cross to an island. The road was well lit and conditions were clear. According to her evidence she came to the edge of the road and stood there. She had no reliable recollection of anything after that until she recovered consciousness lying by the roadside, although she vaguely remembered starting to cross the road.

A witness, Davies, was riding a pedal-cycle meaning to cross the Great West Road. He saw no traffic and proceeded to cycle to the middle of the road, where he stopped. Some cars passed from left to right and one of them was travelling rather faster than the others. As he was standing there he saw the plaintiff standing on the kerb and thought that she wanted to cross the road. Davies did not see the plaintiff step off the kerb but he first heard the high whine of a motor-cycle and a couple of seconds later saw the dipped headlamp some 300 yards away. Thinking it safe to proceed he pedalled across to the other side. When he had gone about a yard he saw that the plaintiff had actually left the kerb where she had been standing and had crossed somewhere about half-way across the roadway. Having got safely across, he heard the increasing noise of the motor-cycle coming behind him; he turned his head round just at the moment when the motor-cycle hit the plaintiff. According to Davies the plaintiff was then approximately three-quarters of the way across and it seemed to him that the motor-cycle was trying to pass between her and the island. Davies also stated that the plaintiff was walking at a moderate pace looking straight ahead of her.

Another witness, Loveday, a pedestrian, said that he heard the sound of a motor-cycle behind him and, as it passed, noticed that it was going very fast. He confirmed that a group of cars had passed ahead of the cycle. He saw the plaintiff step off the pavement when the motor-cycle was still some distance behind him and thought that she would never get across. A few seconds after that there was a crash.

The plaintiff alleged that the deceased was negligent in that he drove at a speed which was excessive in the circumstances, failed to keep any proper or adequate look-out, failed to brake, failed to take any sufficient steps to avoid colliding with the plaintiff and failed otherwise to take any adequate steps for controlling his vehicle. The defendant, while denying negligence, alleged that the collision was caused wholly or in part by the negligence of the plaintiff herself in failing to keep a proper look-out and crossing the road at a time when she saw or ought to have seen that it was unsafe to do so.

Michael Sherrard for the plaintiff.

P. O'Connor for the defendant. Section 3 of the Road Traffic Act, 1934, in the circumstances of the present case, exempted the policeman from observing the speed limit. Therefore no conclusion of any breach of duty can be drawn from the fact that he was driving at 60 miles an hour on a restricted road.

Section 3 does not absolve a driver from dangerous driving or allow him to ignore traffic lights. If the motor-cyclist had been a civilian he would undoubtedly have been guilty of some negligence in driving at 60 miles an hour, though not necessarily entirely to blame for the accident. To show that a police officer was driving at that speed on a restricted road does not prima facie show negligence.

Michael Sherrard in reply. The duty of a police officer to the public is to take the same care as any other driver of any other vehicle. The only effect of section 3 is that a police officer who exceeds the speed limit in the course of his duties is not liable to prosecution for exceeding the speed limit. But he is still under a duty to drive with due care and attention.

[Reference was made to *Ward* v. *London County Council*.[2]]

McNAIR J. stated the facts, found that the plaintiff was about half-way across the road when the motor-cycle hit her; that the police motor-cyclist was properly engaged in pursuing a motor-car that was speeding, and that at the time he was proceeding at 60 miles an hour, probably more, in pursuance of his police duties. His Lordship continued:

In those circumstances, it is clear by reason of section 3 of the Road Traffic Act, 1934, although the road in question was subject to a 40 miles an hour limit, he (the driver) was not guilty of a criminal offence, for section 3 provides: "The provisions of "any enactment, or of any statutory rule or order, imposing a "speed limit on motor vehicles shall not apply to any vehicle on "an occasion when it is being used for fire brigade, ambulance "or police purposes, if the observance of those provisions would "be likely to hinder the use of the vehicle for the purpose for "which it is being used on that occasion." On the facts, I am prepared to infer and hold that this motor-cycle was being used for police purposes, and was being driven under conditions in which the observance of the 40 miles an hour speed limit would have hindered the use of that vehicle for the purpose for which it was being used.

That, however, deals only with criminal liability, and it raises a question which, so far as I know, is without authority, namely, whether and to what extent the circumstances which bring that provision into effect, affects the civil liability of the driver. It is argued on behalf of the defendant that if the motor-cyclist had not been driving on official business and had been proceeding at 60 miles an hour or more on that road on that occasion it would have been difficult for him to escape at least partial liability, but those considerations do not apply in the present case. On the other hand, it is observed, and rightly observed, that this exempting provision in section 3 of the Road Traffic Act, 1934, does not in any way absolve police drivers from criminal liability for dangerous driving or, indeed, for driving without due care and attention. It is submitted that section 3 must be given a strictly limited application to criminal responsibility and does not affect in any way the driver's civil liability.

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[2] [1938] 2 All E.R. 341.

In my judgment, the driver of this police motor-cycle on this occasion must be judged, as regards civil liability, in exactly the same way as any other driver of a motor-cycle in similar circumstances. He, like any other driver, owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger.

It seems to me that on this occasion it is clear that Davies was misled as to the speed of the motor-cycle's approach, because he only just managed to get across without being himself involved in a collision. Similarly, I think that the fair inference is that the plaintiff too (whom I am not prepared to assume failed to look to her right on this crossing, which she had crossed many times) was initially at least misled.

The question, as I see it, is this: First, is it clear that the police motor-cyclist, judged by the standard of an ordinary driver of a motor-vehicle on his private occasions, is to be held guilty of negligence causing the accident? I think the answer to that clearly must be "Yes." To drive at that speed on a restricted road, in the half-light at a time of the evening when it must be known that there may be pedestrians making their way home, is itself, in my judgment, to drive at an improper and unsafe speed.

The second question is whether the plaintiff herself is to be held to any extent, and, if so, to what extent, responsible for the accident. She was unconscious after the accident and is unable to give me her own evidence as to her actions or reactions, but I have this, that Davies deposes to the fact that he saw her walking at a medium pace, not dawdling, looking in front of her, at a time when she was half-way across the road, with no appearance that she was looking up the road at any time after she had stepped off. Loveday was not really in a position to see whether she did look to her right before stepping off, but he clearly formed the conclusion that she had misjudged the position, in that she thought she could get safely across, whereas in fact she could not.

I think that the fair conclusion is that when she stepped off the pavement, she did act in the way in which she normally would act, namely, she looked to the right to see whether her way was clear; that she may have seen the dipped headlight approaching and may have been misled in the same way as was Davies; but it seems that having once decided to make her way across, she went straight across without glancing again to her right.

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McNair J.

In those circumstances, I think that she must bear some part responsibility for the accident, and making the best estimate I can, bearing in mind this further fact, that this was not a pedestrian crossing, I think that the plaintiff must bear one-third of the responsibility and the defendant two-thirds.

[His Lordship considered the question of the damages and continued]: The special damages have been agreed at a figure of £350 19s. 6d. General damages I assess at the sum of £750. There will accordingly be judgment for the plaintiff for two-thirds of that figure.

Judgment for the plaintiff.

Solicitors: *D. J. Freeman & Fraser; Ponsford & Devenish, Tivendale & Munday.*

C. J. E.

C. A.

1959
June 9,
10, 11.

Morris,
Ormerod and
Willmer L.JJ.

REGINA *v.* MEDICAL APPEAL TRIBUNAL (NORTH MIDLAND REGION). *Ex parte* HUBBLE.

National Insurance — Industrial injuries benefit — Fresh evidence — Power to review previous decision—Further report of surgeon on claimant's injury—Whether "fresh evidence"—National Insurance (Industrial Injuries) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 62), *s.* 40 (1).
Evidence—Fresh evidence.

Section 36 (3) of the National Insurance (Industrial Injuries) Act, 1946, provides that except as provided by the Act "any "decision of a claim or question shall be final."

The claimant, a coal miner, suffered an injury to his back while at work in July, 1955. In April, 1957, a medical board constituted under the Act of 1946 made a final assessment of the extent of his disablement at 5 per cent. for life.

He appealed against the smallness of that award to a medical appeal tribunal under section 39 (2) [1] of the Act. At the date of the hearing on July 15, 1957, he was in a plaster bed in hospital, having undergone an operation for his back condition on July 4. The tribunal had before it a report of the surgeon, dated June 28, 1957, stating that it was too early to estimate the final assessment of the disablement but that the surgeon would like to send a further report later. The report did not state that an operation was to be performed.

The tribunal, without any adjournment, gave their decision on July 15, setting aside even the award of 5 per cent. and finding that any loss of faculty that might have been suffered was due to

[1] For footnote 1 see p. 410.

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an aggravation of a pre-existing condition which had wholly ceased by May 12, 1957.

On August 2, 1957, the claimant obtained from the surgeon a further report stating that the operation of July 4 had disclosed the presence of a disc injury, that the disablement was the result of an injury, and that the permanent disability would be more than 5 per cent. The claimant thereupon sought to have his case reviewed under section 40 (1) [1] of the Act; and on August 28, 1957, a reviewing medical board, with the further report of the surgeon before them, made a provisional assessment of 10 per cent. disablement from May 13 to June 16, 1957, and of 100 per cent. disablement from June 17 to October 17, 1957.

The Minister referred that decision to the medical appeal tribunal under section 39 (3) of the Act. The tribunal, by their decision on October 28, 1957, set aside the reviewing medical board's assessments, giving as their reason their view that the further report of the surgeon was not "fresh evidence" within section 40 (1) since the claimant could have obtained a second opinion from the surgeon before the decision of July 15 or could have asked for an adjournment of that decision.

On appeal by the claimant against the refusal of the Divisional Court to bring up and quash by order of certiorari the decision of October 28 on the ground of error of law on the face of the record:—

Held, that the decision of October 28 did not disclose any error of law and the tribunal had correctly construed "fresh evidence" in section 40 (1) as meaning evidence "which the claimant was "unable to produce before the first decision was given or which he "could not reasonably be expected to have produced in the circum-"stances of the case." The scheme of the Act in relation to the review of purely medical questions showed that such questions were intended to be dealt with once for all, subject to a strictly limited right of review in exceptional cases where a reviewing board was satisfied by "fresh evidence," videlicet, evidence newly available, in the limited and restricted sense given to those words in decisions under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, and to the words "further evidence" in R.S.C., Ord. 58, r. 9 (2). To construe them more widely as meaning further or additional information which could have been given on an earlier hearing would enable a dissatisfied party to obtain successive reviews whenever a fresh medical opinion was obtained, and would be contrary to the policy of the Act.

Johnson v. *Johnson* [1900] P. 19, 20–21; 16 T.L.R. 26 followed.

Decision of Divisional Court on this point [1958] 2 Q.B. 228; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374 affirmed.

APPEAL from Divisional Court (Lord Goddard C.J., Cassels and Diplock JJ.).

On July 14, 1955, Horace Hubble, a coal miner, while in the act of getting a truck back on to some rails when at work at the Hucknall Colliery, Nottinghamshire, sustained an injury

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[1] See note on p. 410.

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to his back by an accident arising out of and in the course of his employment. He was away from work for certain periods and drew injury benefit pursuant to the provisions of section 11 of the National Insurance (Industrial Injuries) Act, 1946,[1] until the expiration of the injury benefit period on January 12, 1956. Thereafter his case was considered as that of an insured person entitled to disablement benefit under the provisions of section 12 (1) (as amended by the National Insurance (Industrial Injuries) Act, 1953 [1]); and the appropriate medical board at Mansfield made a number of successive provisional assessments of the extent of his disablement for relatively short periods, ultimately expiring on May 12, 1957, and on April 24, 1957, the medical board made a final assessment of the extent of his disability at 5 per cent. from May 13, 1957, for the period of his life, and found that the loss of faculty in respect of which the assessment was made resulted from the accident of July 14, 1955. The effect of the finding was to entitle the applicant to a disablement gratuity of £67 10s.

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[1] National Insurance (Industrial Injuries) Act, 1946, s. 12 (1) [as substituted by s. 3 (1) of the National Insurance (Industrial Injuries) Act, 1953]: "Subject to the next following subsection, an insured person "shall be entitled to disablement "benefit if he suffers as a result of "the relevant accident from loss of "physical or mental faculty such that "the extent of the resulting disablement assessed in accordance with "the following provisions of this section amounts to not less than one "per cent.; and for the purpose of "those provisions there shall be "deemed not to be any relevant loss "of faculty when the extent of the "resulting disablement, if so assessed, "would not amount to one per cent."

S. 39: "(1) The case of any "claimant for disablement benefit "shall be referred by the insurance "officer to a medical board for determination of the disablement questions in accordance with the following provisions of this Part of this "Act relating to the determination of "claims, and if, on that or any subsequent reference, the extent of "the disablement is provisionally "assessed, shall again be so referred "not later than the end of the period "taken into account by the provisional "assessment. (2) If the claimant is "dissatisfied with the decision of a "medical board, he may appeal in the "prescribed manner and within the "prescribed time and the case shall "be referred to the medical appeal "tribunal: Provided that an appeal "shall not lie against a provisional "assessment of the extent of disablement before the expiration of two "years from the date of the first "reference of the case to a medical "board under the foregoing subsection, nor where the period taken "into account by the assessment falls "wholly within the said two years. "(3) If the Minister notifies the insurance officer within the prescribed "time that he is of opinion that any "decision of a medical board ought "to be considered by a medical appeal "tribunal, the insurance officer shall "refer the case to a medical appeal "tribunal for their consideration, and "the tribunal may confirm, reverse "or vary the decision in whole or in "part as on an appeal."

S. 40: "(1) Any decision under this "Act of a medical board or a medical "appeal tribunal may be reviewed at "any time by a medical board if "satisfied by fresh evidence that the "decision was given in consequence "of the non-disclosure or misrepresentation by the claimant or any "other person of a material fact "(whether the non-disclosure or misrepresentation was or was not "fraudulent)."

A few days after that decision, on April 30, 1957, the claimant again went off work, and, with the exception of one or two days in May, remained away from work until November, 1957.

On June 5, 1957, while awaiting admission to Harlow Wood Hospital for his back condition, the claimant gave notice of appeal under section 39 (2) of the Act of 1946 to the medical appeal tribunal against the decision of the medical board of April 24, in a letter which showed that he considered that the extent of his disability had been fixed at too low a percentage.

On June 17, the claimant was admitted to hospital, and on July 4, 1957, underwent an operation for removal of a prolapsed disc. Some 11 days later, on July 15, the claimant's appeal was heard by the medical appeal tribunal. He was still in a plaster bed in hospital, following the operation on July 4, and was represented at the hearing by a trade union official, Mr. Clarke, of the National Union of Mineworkers, who tendered a report by Mr. Malkin, a surgeon who had examined the claimant in hospital on June 28, 1957, before the operation, and stated, in the form of a letter to the trade union official: "As requested "by you I examined this man at Harlow Wood Hospital where "he is an in-patient. History: He first attended Mansfield "Hospital on July 15, 1955, complaining of pain in his back "which he thought had come on after work which involves "pushing. The first pain he felt was at the end of December, "1954, and he did not improve. He said that the pain was "on the left side of his back and down his leg and that it "was made worse by coughing and sneezing. There was tenderness over the sacro-iliac joint. I saw him on July 22 and "found that there was limited movement of his spine and pain "was referred to the left sacro-iliac region. He was given a "course of physiotherapy and was seen again on October 5, when "he said he was not improving. He was then seen early in "1957. He complained of pain in his back. There was pain "on stretching the left sciatic nerve and considerable limitation "of movement of the spine. I thought there were some signs "of a disc lesion and I recommended his admission to Harlow "Wood where he now is. He is lying on a plaster bed preparatory to further treatment. Opinion: This man is suffering

" from a condition affecting his spine which has resulted from " his work and I consider that he requires in-patient hospital " treatment. It is impossible at the present time to give a " definite estimate of what his life assessment would be, but " I should like to send you another report later."

There were also presented to the tribunal some written observations on behalf of the Minister, concluding with the submission that " having regard to the medical evidence " (which included certain hospital notes) " (a) the claimant's back condition is only " partly attributable to the relevant accident, and (b) the relevant " loss of faculty has been correctly assessed."

On or about July 31, 1957, the tribunal notified the claimant of their decision of July 15 in the following terms: " Dear Sir, " With reference to your claim for disablement benefit the medical " appeal tribunal, which considered your case on July 15, 1957, " decided that . . . from May 13, 1957, there is no loss of " faculty resulting from industrial accident on July 14, 1955. The " findings of the tribunal are summarised as follows: Mr. Hubble " is in hospital but we heard Mr. Clarke of the National Union " of Mineworkers with the medical report of June 28, 1957, by " Mr. Malkin. It is clear from the medical evidence before us, " including the hospital notes, that any loss of faculty which may " have resulted from the relevant accident was only an aggravation of a pre-existing condition, which aggravation had ceased " by May 12, 1957. We set aside the assessment of medical " board of April 24, 1957."

After the tribunal's decision of July 15, 1957, which was notified to the applicant on July 31, 1957, the applicant remained in hospital and was examined again by his surgeon, Mr. Malkin, who reported on August 2, again in the form of a letter to the trade union official, as follows: " As requested by you I saw this " man today. Since I last examined him he has had operative " treatment in Harlow Wood Hospital for a disc lesion. As a " result of the investigation, it was decided that there probably " was an injury to an intervertebral disc, and the operation which " was carried out on July 4, 1957, showed that a disc injury was " present. This was removed and a graft was applied to the " spine. Since then, he has made good progress but he will " require further treatment at Harlow Wood for at least another " month before he commences to get up. Opinion: This man " is suffering from the effect of an injury to an intervertebral " disc which has probably been caused by the type of work he " does which involves constant bending and twisting in a bent "position. I consider that his present condition is due to the "effects of an injury. He will have a permanent partial disability which will be more than 5 per cent."

Armed with that report, the claimant asked for a review by the medical board under section 40 (1) of the Act of 1946. On August 28, 1957, the medical board decided that they could review under subsection (1). Their decision took the form of answers to two questions on a printed and prepared form headed "Disablement benefit. Medical board report. Review on the "ground of non-disclosure or misrepresentation of a material "fact." Under the heading "Decision of the medical board on "application for review," the first question: "(1) Are you satisfied "by fresh evidence that the decision under review was given in "consequence of the non-disclosure or misrepresentation by the "claimant or any other person of a material fact?" was answered "Yes." The second question was: "(2) If the answer to (1) "is yes, please state the nature of the fresh evidence and the "material fact." The answer to that was as follows: "The "claimant, Mr. Hubble, was admitted to Harlow Wood Hospital "on June 17, 1957: operation July 5, 1957, for prolapsed intervertebral disc, bone graft from left ilium followed by plaster "of paris and now confined in strict bed and still a patient at "Harlow Wood. Also a further report confirming the above "from Mr. Malkin's letter of August 2, 1957."

The medical board then made provisional assessments of the extent of the disablement from May 13 to June 17, 1957, of 10 per cent. and from June 17 to October 17, 1957, of 100 per cent.

Thereupon, pursuant to section 39 (3), the Minister directed the insurance officer to refer the decision of the medical board to a medical appeal tribunal.

The decision of the medical appeal tribunal dated October 28, 1957, was as follows: "Having considered the decision of the "above-mentioned medical board" [the medical board held at Mansfield on August 28, 1957] "on the case of the person named "(who was represented by Mr. Clarke of the National Union of "Mineworkers) the tribunal have decided as follows: There is "no fresh evidence to show that the decision under review was "given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact." There were then set out the reasons for the decision, including the findings on all questions of fact material to the decision, as follows: "When the medical appeal tribunal gave its decision "on July 15, 1957, it had Mr. Malkin's report of June 28, 1957, "before it, and the claimant had already undergone the operation of July 4, 1957. The claimant obtained a second report "from Mr. Malkin on August 2, 1957. Our attention has been "drawn to a decision (No. R(I) 16/57) of the [Industrial Injuries] Commissioner who held that '"fresh evidence" means "'some evidence which the claimant was unable to produce "'before that decision was given or which he could not reasonably be expected to have produced in the circumstances of "'the case.' It was, in our judgment, possible for the claimant "to have obtained a second opinion from Mr. Malkin before the "medical appeal tribunal gave its decision. The claimant could "have asked the medical appeal tribunal to grant an adjournment if they had had insufficient time to get a second report "from Mr. Malkin, but we think that eleven days (namely, "from July 4, 1957, when the claimant had the operation to "July 15, 1957, when the medical appeal tribunal heard the "case) was sufficient time. In the circumstances we must "allow this reference, and set aside the decision, dated August "28, 1957, of the review board."

The claimant thereupon sought and obtained leave from the Divisional Court to move for two orders of certiorari. The first was in reference to the decision of the medical appeal tribunal of July 15, 1957. It was contended that the medical appeal tribunal when determining the appeal of the claimant against the decision of the medical board dated April 24, assessing his disablement at 5 per cent. final for life, had no jurisdiction to set aside such assessment by holding that there was no relevant disability. That application was dismissed by the Divisional Court on May 16, 1958.[2] The Divisional Court also dismissed a motion for an order of certiorari in respect of the decision of the medical tribunal dated October 28, 1957. The contention in support of such motion was that the tribunal was wrong in law on the face of its award in holding, and so directing itself, that fresh evidence under section 40 (1) of the Act of 1946 meant some evidence which the claimant had been unable to produce before the decision of July 15, notified on July 31, was given, or which he could not reasonably have been expected to have produced in the circumstances of the case.

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[2] [1958] 2 Q.B. 228; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374.

The claimant appealed only against the refusal to bring up and quash the decision of the medical appeal tribunal of October 28, 1957.

F. W. Beney Q.C. and *Henry S. Ruttle* for the applicant. First, as this appeal is only against the Divisional Court's refusal of certiorari for error of law on the face of the decision of October 28—namely, the definition of "fresh evidence" in section 40 (1) of the Act of 1946—the court is limited to looking at the decision; but that decision refers to other documents which the court may consider as incorporated in the decision. In *Baldwin and Francis Ltd.* v. *Patents Appeal Tribunal* [3] four members of the House of Lords declined to decide what documents could be incorporated for this purpose; but Lord Denning [4] adhered to what he had previously said in *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore* [5] on the extent of the record. [*Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw* [6] was also referred to.]

[*J. R. Cumming-Bruce* for the tribunal. It is conceded that, for the purposes of this appeal, the court should look at the earlier decision of July 15, the two specialist's reports, and the reviewing board's decision, all of which are referred to on the face of the record under consideration.]

Beney Q.C. continuing. On the main point of appeal, the words "fresh evidence" in section 40 (1) of this Act should not be given the strict legal meaning which they were given by Sir Francis Jeune P. in *Johnson* v. *Johnson* [7] when considering the same words in the Summary Jurisdiction (Married Women) Act, 1895. They should be given the broader meaning of "fresh "information" from any source—hearsay, examination by the tribunal itself, and so on—which for some reason was not given to the first tribunal, but which, if given, would have influenced the decision. These proceedings under the Act are designed to decide whether an injured person is entitled to benefit, and should not be burdened with technical limitations. It is clear that all sorts of information comes before the tribunal which would not be looked at in a court of law. The Divisional Court, in dealing with section 39 of this Act, said that a hearing by a medical appeal tribunal was a homely type of inquiry like an inquest, and should not be regarded as a case inter partes with strict rules about notices of appeal; but they then inconsistently decided that in relation to section 40 (1), the strictest legal rules of proceedings inter partes should be applied in construing "non-disclosure" and "fresh evidence." [*Reg.* v. *Skeen and Freeman*[8] was also referred to.]

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[3] [1959] 2 W.L.R. 826; [1959] 2 All E.R. 433.

[4] [1959] 2 W.L.R. 826, 842.

[5] [1957] 1 Q.B. 574; [1957] 2 W.L.R. 498; [1957] 1 All E.R. 796.

[6] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[7] [1900] P. 19, 20–21; 16 T.L.R. 26.

[WILLMER L.J. It is unfortunate for this submission that Parliament has chosen to use a phrase hallowed by usage over many years.]

[MORRIS L.J. Could an applicant put forward as "fresh "evidence" evidence which he had in his pocket but did not produce to the tribunal because he did not think it was material.]

Yes; it would be "fresh evidence," though not fresh knowledge. In any event the tribunal in July should not have made their decision without inquiring whether they had all the evidence obtainable from the hospital or offering an adjournment until it became available. The matter should be sent back to the tribunal. Denning L.J. in *Reg.* v. *Medical Appeal Tribunal, Ex parte Gilmore*[9] thought that that could be done; and this court always has power to order an inferior court to send up a complete and perfect record. [*In re Chennell, Jones* v. *Chennell*[10] and *Edwards (Inspector of Taxes)* v. *Bairstow*[11] were also referred to.]

J. R. Cumming-Bruce for the tribunal. The scheme and background of this Act are relevant to the question on this appeal. The careful drafting of section 40 was designed to avoid the very situation which has arisen here, for the intention of Parliament was to ensure finality in medical questions. This Act replaced the Workmen's Compensation Acts with a new insurance scheme, and as an Act envisaging claims on a fund it reflects in its drafting the importance attached to non-disclosure or misrepresentation of a material fact in the common law of insurance and under the Marine Insurance Act. The words used in section 40 (1) have to be considered with an appreciation of the different words used for the different types of review given by the Act, one kind of review for one type of question and another for another. Section 40 gives two types of review—one under subsection (2), where there has been an unforeseen aggravation; and the other under subsection (1), where the board is "satisfied" by "fresh evidence." Those words were carefully chosen to bear the meaning which they have attracted by usage over half a century. If they meant only "fresh information," it is difficult to see why they have been put in at all. That they were put in for a purpose appears from the National Insurance (Industrial Injuries) Act of 1953, amending section 50 (1) (*a*) (by section 4 (4)) and making it unnecessary for an insurance officer or a local tribunal to have to be satisfied by "fresh evidence"; and it is appropriate, when construing this subsection, to consider an amending Act which is in pari materia. Though it might be desirable to grant a right of review on fresh information, section 40 (1) does not provide it, for the paramount aim of sections 39 and 40 of this Act is to impose on the board and the tribunal the duty of settling once for all those questions which they consider should be so settled. If the tribunals do not think that final assessments should be made because of the medical circumstances, they have power to make provisional assessments. Their powers of review are admittedly much more limited than those of the Minister under section 37 (6) or the procedure under the Family Allowances Act, 1945, which is imported into this Act. It is also admitted that certain of the limited powers of review are "one way only," namely, only in the power of the Minister; but though legislative reform might be desirable, the present position is that the right to review here contended for is not given to this claimant by section 40 (1), and he is without a remedy unless he can bring his case under subsection (2). If the construction contended for were right, it would be possible for a claimant to come back again and again to the board every time he had new symptoms not stressed before, or a new medical opinion not used before; the words "fresh evidence" would add nothing to the section, and there would be no reason for putting them in. But that they are there for a purpose is evident from the amendment in the Act of 1953. They are not loose drafting, but are imported in the sense in which lawyers have understood them and the courts have construed them for half a century. They are synonymous with the words "further evidence" in R.S.C., Ord. 58, r. 9 (2), and are correctly construed on the face of the record under consideration.

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[8] (1859) Bell's Crown Cases 97.

[9] [1957] 1 Q.B. 574, 582.

[10] (1878) 8 Ch.D. 492.

[11] [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48.

Beney Q.C. in reply. This claimant cannot prove "unforeseen aggravation," and it would be wrong to give him a ray of hope of a remedy under subsection (2), for this is a tribunal tied by rigid rules and unless he can rely on his strict legal rights he has no hope of getting anything.

The submission that by looking at other sections of this Act and contrasting the different types of review available where the words "fresh evidence" are not used does not assist on the question of construction; nor does the amendment in the Act of 1953 assist on the meaning of "fresh evidence" in the Act of 1946, though it may be relevant to the meaning of "non-disclo-"sure." Nothing in the dictionary meaning of the word "fresh" indicates that the words under consideration mean evidence which could not have been given before. That meaning is an import from the Summary Jurisdiction Act of 1895 as construed by the courts and from the meaning given to "further evidence" in R.S.C., Ord. 58, r. 9 (2); but that narrow meaning applied to those words where they occur in the Act of 1946 will limit the beneficial effects of the section very considerably and is inconsistent with the intention that a man should get disablement benefit through tribunals which are not conducted according to strict rules of legal construction. The broader meaning contended for would enable justice to be done.

It is conceded that in these proceedings for certiorari the court cannot consider whether the specialist's second report was or was not in fact "fresh evidence" within the meaning given to that expression by the tribunal.

MORRIS L.J. said that it was necessary to state the history of this matter in order to explain the point which now arose and the scheme and provisions of the Act of 1946. His Lordship read section 12 (1) which defined the circumstances in which an insured person became entitled to disablement benefit, in the form substituted in the National Insurance (Industrial Injuries) Act, 1953. Section 36 of the Act of 1946 provided that disablement questions under the Act were to be determined by medical boards or medical appeal tribunals.

[His Lordship then stated the facts leading to the claimant's first appeal on July 15, 1957, set out above, and continued:] The Act of 1946 contains many detailed provisions which not only prescribe the manner in which the questions arising under the Act are to be determined but also provide for certain appeals and for certain reviews of decisions. Section 36 (1) provides: "Subject to the provisions of this Part of this Act, any of "the following questions arising under this Act shall be deter-"mined as provided by this subsection, that is to say," then paragraph (*a*) provides that certain defined questions are to be determined by the Minister. Section 37 provides for appeals in certain cases from the Minister's decisions and, subject to certain conditions, for a review by the Minister.

Section 36 (1) (*b*) provides that other defined questions are to be determined in like manner "subject to any prescribed "modifications and adaptations, as a corresponding question "arising in respect of an allowance under the Family Allow-"ances Act, 1945." Section 36 (1) (*c*) provides: "any ques-"tion—(i) whether the relevant accident has resulted in a "loss of faculty; (ii) whether a loss of faculty is likely to be "permanent; (iii) at what degree the extent of disable-"ment resulting from a loss of faculty is to be assessed, "and what period is to be taken into account by the assessment; "shall be determined by a medical board or medical appeal tri-"bunal constituted in accordance with the following provisions "of this Act." Section 38 provides for the constitution of medical boards and medical appeal tribunals. Section 39 deals with references to medical boards and appeals and references to medical appeal tribunals. Section 40, which falls specially to be considered in this case and to which I will later refer, provides that, in certain circumstances, there may be a review of a decision of a medical board or of a medical appeal tribunal.

Section 36 (2) is in the following terms: "Subject to the "foregoing provisions of this section, any claim for benefit and "any question arising in connection with a claim for or award of "benefit shall be determined by an insurance officer, a local "appeal tribunal or the commissioner appointed or constituted "in accordance with the following provisions of this Act." Sections 42, 43 and 44 provide for the appointment of the commissioner and deputy commissioners, for the constitution of local appeal tribunals, and for the appointment of insurance officers. Sections 45, 46 and 47 provide for the determination of claims by insurance officers and references to local appeal tribunals and for appeals to the commissioner. Then, by section 50, which has now been amended by section 4 of the Act of 1953, it was provided that in certain circumstances there might be a review of a decision of an insurance officer, a local appeal tribunal, or the commissioner.

It will be seen, therefore, that, as laid down in the Act, different types of questions fall to be determined in different ways and that after determinations there are certain appeals and that, subject to certain stated conditions, there may be reviews.

Section 36 (3) provides as follows: "Except as provided by "this Part of this Act or by the Family Allowances Act, 1945, "as applied by paragraph (b) of subsection (1) of this section, "any decision of a claim or question as provided by the fore-"going provisions of this section shall be final."

[His Lordship stated the facts as to the hearing of the appeal on July 15, read the surgeon's first report, and continued:] It will be seen that Mr. Malkin stated that the pain in the claimant's back was first felt by him at the end of December, 1954, which was over six months before the pain of which he complained on July 15, which he thought had come on after work which involved pushing. It will also be seen that the report was dated some 17 days before the hearing before the medical appeal tribunal.

[His Lordship set out the Minister's written submissions, and the terms of the decision of the medical appeal tribunal of July 15, 1957, and continued:] It will be seen, therefore, that the result of the claimant's appeal was that not only did he not succeed in getting anything he asked for but he also lost the modest measure of success that he had achieved before the medical board. The appeal tribunal decided that any loss of faculty which may have resulted from the relevant accident was only an aggravation of a pre-existing condition and that such an aggravation had ceased on May 12.

That decision came as a disappointment to the claimant. As Mr. Malkin's letter of June 28 had stated that the claimant was lying on a plaster bed preparatory to further treatment, and as Mr. Malkin had said that he would like to send another report later, it may seem unfortunate that some postponement of a final decision, whether on request or on offer, did not take place. But it may be that the tribunal considered that they would not be further assisted by seeing another report. The nature of the present proceedings does not, however, provide us with means of knowing whether some alternative course could helpfully have been followed.

Having lost on appeal, the claimant sought to have a review, under the provisions of section 40 (1).

[His Lordship read the subsection, concluded his statement of the facts, as set out above, and continued:] Appeal is now brought to this court and the question which arises is whether there is any error of law on the face of the decision of October 28. If there is not, then no case for making an order of certiorari is made out. Though we are only concerned with the decision of October 28, it has been agreed for the purposes of this case, and very helpfully agreed, by Mr. Cumming-Bruce that it is appropriate, having regard to the references in the decision of October 28, that we should look at the two medical reports, the decision of the medical appeal tribunal of July, and the decision of the medical board of August 28. Mr. Cumming-Bruce stated expressly that it was in the circumstances of this case, and having regard to the features of this case, that we were entitled to look at those other documents.

It is clear that a review under section 40 (1) may only take place if the medical board is satisfied that the decision to be reviewed was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact (whether or not there was fraud) and that the medical board is so satisfied by fresh evidence. The decision of the medical appeal tribunal of October 28 recorded in terms what view it held as to the meaning of the words "fresh evidence." The decision was made on the basis of the interpretation which was followed as to what those words mean. If those words were correctly construed, then there is no error of law on the face of the award. There is no statutory provision for an appeal from the decision of a medical appeal tribunal and the jurisdiction of the Queen's Bench Division in its control of inferior courts cannot be enlarged so as to give an appeal in the ordinary sense.

Mr. Beney has submitted that, in their context, the words "fresh evidence" mean no more than further or additional evidence or further or additional information. He submits that any evidence additional to that which was before the medical appeal tribunal on July 15 would qualify to be called "fresh "evidence," even though it was evidence that could then readily have been given. But this submission, in my judgment, gives no real or satisfactory meaning to the word "fresh."

It is interesting to contrast the ways in which certain reviews may take place. Thus, in regard to decisions of the Minister, section 37 (6) provides: "The Minister may, on new facts being "brought to his notice, review a decision given by him of any "such question as is mentioned in paragraph (*a*) of subsection "(1) of the last foregoing section." Then follows a proviso which I need not read. In the case of any matters coming under section 36 (1) (*b*), there is a provision in section 5 (3) of the Family Allowances Act, 1945, as follows: "The Minister "may at any time and from time to time revise any award "made or decision given by him under this Act, if it appears "to him that the award or decision was erroneous either in view "of further information which has been brought to his notice "since the date on which it was made or given as to the circumstances existing at the time by reference to which it was "made or given, or by reason of some mistake having been made "with respect to those circumstances or to the law." Then follows a proviso which I need not read.

In the case of decisions of insurance officers, local appeal tribunals, or the commissioner, it was provided by section 50 (1) as follows: "Any decision under this Act of an insurance officer, "a local appeal tribunal or the commissioner may be reviewed "at any time by an insurance officer, or, on a reference from "an insurance officer, by a local appeal tribunal, if—(*a*) he or "they is or are satisfied by fresh evidence that the decision "was given in ignorance of, or was based on a mistake as to, "some material fact; or (*b*) there has been any relevant change "of circumstances since the decision was given; or (*c*) the "decision was based on the decision of a special question and "the decision of the special question is revised under this Part "of this Act or the Family Allowances Act, 1945: Provided that "a decision that an accident was not an industrial accident shall "not be a subject to review, and a decision that an accident was "an industrial accident shall only be subject to review where "the insurance officer or local appeal tribunal, as the case may "be, is or are satisfied by fresh evidence that the decision was "given in consequence of any wilful non-disclosure or misrepresentation of a material fact." That section has in certain ways been amended by section 4 (4) of the Act of 1953; but it is to be observed that twice in that section the words "fresh "evidence" are used. All those provisions, which are in differing terms, denote careful and deliberate drafting. The reviews that may take place are limited by the requirements of the particular words that are used. It seems to me that the words "fresh evidence" bear the same meaning in section 40 as they do in section 50. They are words which have been considered by the courts, and as Parliament has employed them in certain contexts in this legislation, it is reasonable to give them due and proper meaning. If a term with a legal meaning is employed, it is reasonable to consider that the term is employed with its accepted meaning.

If an appellant had knowledge of some material fact at the time when he was appearing before a medical appeal tribunal, but, if for some reason he decided not to disclose such material fact, and if a decision were given, I cannot think that he could then seek to review the decision by bringing the material fact before the medical board and asserting that he had "fresh "evidence." In my judgment, he would not have "fresh "evidence." "Fresh evidence," it seems to me, must have the quality of newness, or the feature of having become newly available and obtainable.

Assistance is provided by considering the decision in *Johnson* v. *Johnson*,[1] concerning the meaning of the words "fresh evidence," which were used in the Summary Jurisdiction (Married Women) Act, 1895, s. 7, which reads as follows: "A court of "summary jurisdiction acting within the city, borough, petty "sessional or other division or district, in which any order under "this Act or the Acts mentioned in the schedule hereto, or "either of them, has been made, may, on the application of "the married woman or of her husband, and upon cause being "shown upon fresh evidence to the satisfaction of the court at "any time, alter, vary, or discharge any such order" and so on. Sir Francis Jeune P., in his judgment, said[2]: "The question "raised in this case is of general interest, but, to my mind, "absolutely free from doubt. The Summary Jurisdiction "(Married Women) Act, 1895, s. 7, provides that a court of "summary jurisdiction, acting as therein specified, may, upon "fresh evidence, alter, vary or discharge an order previously "made. But it is necessary that magistrates should clearly "understand what 'fresh evidence' means, though, in my view, "there is no real doubt about it. It means practically the same "sort of evidence as that upon which a new trial would, in the "ordinary course, be granted; it must relate to something which "has happened since the former hearing or trial, or it must be "evidence that has come to the knowledge of the party applying "since the hearing or trial, and which could not by reasonable "means have come to his knowledge before that time. It must "amount to what was called in the old forms of pleading res "noviter ad notitiam perventa. It is altogether a mistake to "suppose that 'fresh evidence,' within the meaning of the Act "of 1895, means or includes evidence which could have been "called, but which was not in fact adduced, at the first hearing. "It would be monstrous to suppose that a party could abstain "from calling evidence, and could thereafter proceed to make

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[1] [1900] P. 19; 16 T.L.R. 26.

[2] [1900] P. 19, 20–21.

"application upon application, based on evidence which might "have been tendered in the first instance. I have no hesitation "in saying that to the words 'fresh evidence' in section 7 must "be assigned the limited meaning and scope which I have "indicated. . . ." The judgment of Gorell Barnes J.[3] was to the like effect.

The definition adopted by the medical appeal tribunal was this: fresh evidence means some evidence which the claimant was unable to produce before the decision was given, or which he could not reasonably be expected to have produced in the circumstances of the case. In my judgment, that definition is in no way erroneous. In the context of section 40 (1) I consider that "fresh evidence" does have the meaning which was accepted by the medical appeal tribunal.

For these reasons, I am of opinion that no error of law on the face of the decision is shown, and that, accordingly, the decision of the Divisional Court was correct. I would dismiss the appeal.

Ormerod L.J. I agree that the appeal should be dismissed. The issue before this court in the end resolved itself into a comparatively short point. The only way in which the matter could come first before the Divisional Court and then this court was by way of an application for an order of certiorari. That application, as Morris L.J. has already pointed out, could only succeed if the applicant could satisfy the court that there was a manifest error on the face of the record which would justify the court exercising its discretion in favour of the applicant.

As the matter came before this court, the only question to be considered was whether the medical appeal tribunal was in error in construing the term "fresh evidence" in section 40 (1) of the National Insurance (Industrial Injuries) Act, 1946, as meaning some evidence which the claimant was unable to produce before that decision was given, or which he could not reasonably be expected to have produced in the circumstances of the case. If that is the proper construction of the words of the subsection, then it is an end to this appeal, with the exception that Mr. Beney raised the question that, even if the construction put on those words by the medical appeal tribunal was the correct one, there was still a question, on the face of the documents before the court which constituted the record, whether the report of Mr. Malkin of August 12 should not be regarded as "fresh evidence" even in the light of that construction. But it was pointed out in the course of the argument that this was substantially a question of fact, and the point was virtually abandoned by Mr. Beney in his reply.

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[3] [1900] P. 19, 22.

Had that question been answered in the affirmative, it might well have been that a further question, as to whether there had been a non-disclosure and whether that non-disclosure had been of a material fact, might have had to be considered—as indeed it was considered by the Divisional Court. But that question, in the circumstances, does not arise and, for my part, I say nothing about that part of the judgment of the Divisional Court.

So far as the construction of the words " fresh evidence " is concerned, I agree with the view expressed by Morris L.J. We are considering a term which had been used, and deliberately used, by the draftsman in the section, which has already received judicial interpretation in the construction of an earlier statute.

Reference has been made to the Summary Jurisdiction (Married Women) Act, 1895, and the judgment of Sir Francis Jeune P. in *Johnson* v. *Johnson* [4] has been cited, and I need not repeat it. It is sufficient to say that, since that decision, there has been no question as to what is the proper interpretation of the words " fresh evidence," at least as far as that statute is concerned.

It is interesting to note that R.S.C., Ord. 58, r. 9 (2), gives this court full discretionary power to receive further evidence on a question of fact either by ordinary evidence in court, by affidavit, or by deposition taken before an examiner or commissioner. Although the term there used is " further evidence," not " fresh " evidence," it is of some assistance to note the interpretation which has always been put by the court on those words, and I read, for convenience from the current edition of the Annual Practice, some words of Denning L.J. in *Ladd* v. *Marshall*,[5] where he said: " First, it must be shown that the evidence could " not have been obtained with reasonable diligence for use at " the trial," and then went on to describe other necessary factors to be considered.

That is the position as it was for a considerable number of years before this particular Act was placed on the statute book. And it would seem to me to be sufficient to warrant putting on the words " fresh evidence " the construction which has already been placed upon them in the context of another statute.

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[4] [1900] P. 19, 20–21.

[5] [1954] 1 W.L.R. 1489, 1491; [1954] 3 All E.R. 745.

Mr. Beney submitted that so to construe the words in question was taking much too strict a view of the language of the section, having regard to the fact that this inquiry was not an action inter partes but was an application by an individual for certain benefits from a fund which had been established by statute. His submission was that "fresh evidence" meant nothing more than evidence which was not considered by the tribunal at the hearing. Of course, that would imply that a claimant, if he wished, for any reason, either because he did not think it was important, or because he wished to keep something in reserve, could hold back evidence or information which was in his possession and produce it at a later stage. If he could do that once, there is no reason why it should not be done on a number of occasions, and there would be no end to proceedings which could conceivably arise as a result. I think that must be a possibility which the legislature had in mind, something which it was their intention not to allow. I think that is made clear by the careful use of the language which has been adopted by the legislature in this statute in relation not only to reviews under section 40, but to reviews under section 50 and under other sections. The various forms of language used have already been pointed out by Morris L.J., and I do not propose to repeat them. But they have the effect of strengthening the view which I have formed of the construction of the words which we have been considering.

In my view, therefore, the medical appeal tribunal was right in adopting the construction which they did adopt, which was set out in their decision of October 28, 1957, and, if that be so, it is clear that the appeal must be dismissed.

WILLMER L.J. I have reached the same conclusion, and I am of opinion that the application for certiorari was rightly dismissed by the Divisional Court.

The medical appeal tribunal held that there was no "fresh "evidence" to show that the decision under review was given in consequence of the non-disclosure or misrepresentation by the claimant or any other person of a material fact. In so holding, they followed the decision of a commissioner in an earlier case, where it was held that "fresh evidence" in this context means some evidence which the claimant was unable to produce before the decision under review was given, or which he could not reasonably be expected to have produced in the circumstances of the case. The medical appeal tribunal concluded on the facts that the claimant (or his representative, Mr. Clarke), could have obtained what was claimed to be the fresh evidence, namely, the second report from Mr. Malkin, the surgeon, before the medical appeal tribunal gave its previous decision.

It was, as I understood, conceded by Mr. Beney, that, if the medical appeal tribunal were right in their view as to the meaning of "fresh evidence" in the context of section 40 (1) of the Act, he could not in these proceedings challenge their conclusion that Mr. Malkin's second report did not amount to "fresh evidence" as so construed. But Mr. Beney contended that the expression "fresh evidence," as used in section 40 (1), should not be construed in so narrow a sense, especially bearing in mind that the inquiry before a medical board or a medical appeal tribunal is a somewhat informal proceeding, and in no sense a lis inter partes. He argued that, in relation to such a proceeding, the words "fresh evidence" are wide enough to cover any new information which has come to light since the decision under review, and on which the tribunal might see fit to rely. I find myself unable to accept Mr. Beney's submission, for three reasons. First, the words "fresh evidence," which are used in section 40 (1) of the Act, are words with a long history behind them. They have frequently been considered and have been construed in connection with their use in the Summary Jurisdiction (Married Women) Act, 1895. My Lord has already referred to the judgment of the President [Sir Francis Jeune] in *Johnson* v. *Johnson*[6] (supra). The definition of "fresh evidence" therein laid down has, so far as I am aware, been consistently followed ever since. It seems to me that, when adopting this particular expression in enacting the Act of 1946, Parliament must be presumed to have used those words in the well-defined sense in which they have been judicially construed for so many years.

Secondly, Mr. Cumming-Bruce, in the course of his very forceful argument, persuaded me, by reference to the words used in other sections of the same statute, that the words "fresh "evidence" as used in section 40 (1) were very carefully chosen. Morris L.J. has already referred to the different forms of words used in relation to different kinds of review which are open to dissatisfied parties under various sections of the Act. I do not go over again what my Lord has already said. In the light of the phraseology used in other sections of the Act, I find it difficult to resist the argument that the use of the well-worn phrase "fresh evidence" in section 40 (1) was deliberate, and that those words were carefully chosen so as to restrict the powers of review available under that section.

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[6] [1900] P. 19, 20–21.

Thirdly, I am disposed to agree with Mr. Cumming-Bruce's submission that, if the words "fresh evidence" were to be construed as contended for by Mr. Beney, they would practically be robbed of any meaning, and might as well have been omitted from the section altogether. I would agree with and adopt this passage from the judgment of the Divisional Court, where it is said[7]: "If Mr. Beney were right, it would mean that any "claimant—or presumably any insurance officer—if dissatisfied "by a decision of a medical tribunal, could go and get an opinion "from another doctor and relying upon this or anything con-"tained in it as a material fact, apply for a review. If unsuc-"cessful, the process could be repeated any number of times by "obtaining fresh opinions from fresh medical men." I am satisfied that such a thing could not possibly have been intended by Parliament when this statute was enacted.

On the contrary, as was submitted by Mr. Cumming-Bruce, I think it is clear that the policy of the Act was to ensure that these purely medical questions, which are the questions referred to medical boards and medical appeal tribunals, should be dealt with once and for all, subject to a very strictly limited right of review in exceptional cases. If that were the policy, as it seems to me it must be, there was good reason to provide that, in such exceptional cases, the power to review should be exercised only on the production of "fresh evidence" in the previously accepted sense of those words.

In those circumstances, it seems to me that the unfortunate claimant in this case did not bring himself within section 40 (1), for his application for a review was not, in my judgment, supported by "fresh evidence" as I understand those words. It follows that the medical appeal tribunal were guilty of no error of law in rejecting his claim and reversing the decision of the medical board, and the application for certiorari was rightly refused.

The further question, much discussed by the Divisional Court, as to whether there was, in the circumstances of this case, a non-disclosure by the claimant (or by his representative,

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[7] [1958] 2 Q.B. 228, 242; [1958] 3 W.L.R. 24; [1958] 2 All E.R. 374.

Mr. Clarke), and, if so, whether he was entitled to rely on it, does not, in my opinion, arise and I therefore express no view about it.

Appeal dismissed with costs.
Leave to appeal to the House
of Lords refused.

Solicitors: *Taylor, Jelf & Co. for Hopkin & Sons, Mansfield; Solicitor, Ministry of Pensions and National Insurance.*

M. M. H.

SCOTT *v.* MUSIAL.

[1957 S. No. 2623.]

C. A.
1959
July 3, 6.

Morris, Ormerod and Willmer L.JJ.

Damages—Personal injuries—Jury—Assessment of damages by jury—Limits of power of appellate court to interfere—Whether pattern of awards by judges in comparable cases assist appellate court in considering appeals from awards of jury.

The difference in the approach of an appellate court to an award of damages by a judge sitting alone and an award by the verdict of a jury is such that the court will not interfere merely because it is shown that an award by a jury does not conform to such pattern or level of awards as may have emerged from the decisions of judges in comparable cases. The jury by established practice are given no guidance as to the amount which they should award, nor should they know of any such pattern. Their views may form a valuable corrective to the views of judges; and the appellate court will not interfere with their award unless it is satisfied that it is out of all proportion to the circumstances of the case.

Dicta in *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin and Austin Motor Co. Ltd.* [1935] A.C. 346, 378; *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)* [1942] A.C. 601, 616; 58 T.L.R. 240; [1942] 1 All E.R. 657; *Bocock* v. *Enfield Rolling Mills Ltd.* [1954] 1 W.L.R. 1303, 1306; [1954] 3 All E.R. 94; and *Dolbey* v. *Goodwin* [1955] 1 W.L.R. 553, 555; [1955] 2 All E.R. 166 applied.

APPEAL from Paull J. and a jury.

The plaintiff, Neil Scott, then aged about 28, was gravely injured on May 4, 1957, when his motor-cycle came into collision with the defendant's motor-van. He brought an action for damages, alleging negligence; negligence was denied and contributory negligence alleged against him. On an application by the plaintiff, it was ordered that the trial of the action should be with a jury.

The jury heard evidence which showed the plaintiff's injuries to be extremely serious. He had a fracture of his spine, broken ribs, and severe concussion. His left lung was collapsed. The ribs healed and the lung recovered, but at first he suffered from total paralysis below the waist, and as a result of the spinal injuries communication between brain and limbs was damaged. He was in bed in hospital for many weeks, and after being unconscious for a week he suffered hallucinations as a result of the concussion, which, as the judge told the jury in his summing-up, might indicate damage to brain centres which might result in epilepsy, though the danger of that was at the date of the trial receding as 18 months had elapsed without that development. The plaintiff left the hospital on November 11, 1957, by which time he was able to walk with a calliper and by using a stick, though he was somewhat unsteady. The medical evidence was that he would probably be able to dispense with the calliper within months, though he would have to use a stick and have a strap on his foot. But he was left with serious damage to the bladder which left him without control over it, even in the middle of the sexual act, and his surgeon had said that he would have to undergo a serious operation to bring the urine out through his side into a "contraption" which would have to be removed and emptied and put back again; and that condition would persist all his life. There was also damage to the kidneys, though it was hoped that the proposed operation would obviate the danger of infection of the kidneys. There had also been some paralysis of the rectum which had somewhat improved by the time he left hospital. His potential sexual capacity was also considerably impaired.

The plaintiff had shown a courage and determination applauded by all concerned in the litigation, and he returned to work the day after he was discharged from hospital. His employers, a garage belonging to Nestlé's Ltd., where he was in charge of the maintenance department, assisted him in his anxiety to get back to work, for they took him back at his previous rate of remuneration, although he was not able to work as a skilled artificer but had to concentrate on clerical or administrative work. His employers sent a car for him each morning, and allowed him to work less than a full day until he felt able to do more.

At the trial evidence was given on behalf of his employers, stating that the plaintiff's determination to get back to his old job was " really something," but that he could not do inspections or testing. The company was prepared to keep him on for " a " reasonable time," but that did not mean that he was guaranteed a job for life. He would be kept on as long as possible, but if he could not test vehicles by driving and inspecting he was not worth the wages which he drew at the time of the trial, namely, £15 a week. The company hoped that he would get better and be able to do more practical work, because they would rather have somebody like him getting better and doing the work than have to find somebody else.

The plaintiff gave his evidence sitting in the well of the court, and the jury were able to observe that he could only remain stationary for a few minutes at a time. He was in peril of falling, and had fallen a few days before the trial and broken his wrist. It was hoped that his muscles would get stronger so that he could dispense with the calliper and have a kind of T-iron fitting to his heel.

The judge, in his summing-up to the jury, dealt with the question of prospects of employment as follows: " He is also " entitled, in that sum that you put down there, to have borne in " mind the fact that it is all very well to say that he is in " employment, earning as much as he did before the accident; " you will remember that the manager of Nestlé's, who gave " evidence . . . said: ' Well, we thought we ought to employ him " ' for a reasonable time.' You may think that that was very " good of Nestlé's because, after all is said and done, they had no " interest in this matter, because it did not happen in the course " of his work. But it does not follow from that that they will " go on employing him; it does not follow that this man's " income is safe; ' for a reasonable time ' was the evidence; and " after that, he has to shift for himself. He has to try and find " work, and I thought it right to ask the manager this simple " question: ' If that man came to you for a job as a mechanical " ' supervisor and you did not know anything about him, would " ' you give it to him? ' and he said: ' Oh, no.' You have to " take that into account, members of the jury: you have to take " into account that this is a man who not only has difficulty in " walking, but who is uncomfortable when he sits down, and quite " obviously has other difficulties."

Directing the jury on damages, the judge invited them to be moderate. He told them that they must arrive at a sum which was fair, to cover pain and suffering, loss of the amenities of life and the disabilities to which the plaintiff was now subject, and possible loss of future earnings. He continued: "It is not going "to be a grossly extravagant sum in the sense that you would "say: 'I would not have that happen to me for a million pounds' "—that is ridiculous; but you have to be fair to the defendant "and fair to the plaintiff. Obviously it is not going to be a small "sum; obviously it will be a substantial sum—you may think, a "pretty substantial sum, but, of course, not absurdly extrava-"gant. . . . It is a sad case, but you must remember that there "are other cases just as bad, or worse, that come before these "courts. There are cases of this kind, where the man is reduced "to the position of never being able to get off a bed again, or "having to sit in a chair for the rest of his life, so although you "realise that these injuries are very serious and the results are "very unpleasant, you must not run away and give him a "fantastic sum; you must take some sum which you think is "reasonable for the defendant to pay and for the plaintiff to "receive, and I can help you no further about that."

The jury, after a retirement of several hours, returned a verdict for the plaintiff on liability and awarded him a total of £18,487 10s. damages, £18,000 of which total was attributable to general damages.

The defendant appealed, asking for a new trial on the issue of damages, or alternatively, that the verdict and judgment be varied by substituting a sum less than £18,487 10s. on the grounds (1) that there had been a misdirection by the judge in suggesting that the plaintiff's present employment was only of limited duration, and that after a reasonable time he would have to find other work, and (2) that the general damages totalling £18,000 were a wholly erroneous estimate of the damage suffered by the plaintiff, and out of all proportion to the facts of the case and ought to be reduced.

N. J. Skelhorn Q.C. and *Victor Watts* for the defendant. First, there was misdirection in that the trial judge suggested that this plaintiff's present employment was of limited duration, and that after a reasonable time he might have to find other work.

Secondly, general damages of £18,000 was a wholly erroneous estimate of the damage suffered and out of all proportion to the facts of this case. The principles to be observed by an appellate court on appeal from the verdict of a jury are not in doubt, namely, that this court will not interfere unless the figure awarded is " out of all proportion " (see *Nance* v. *British Columbia Electric Railway Co. Ltd.*[1]), or is such that a reasonable jury could not have awarded it. [*Bocock* v. *Enfield Rolling Mills Ltd.*, *per* Singleton L.J.,[2] was also referred to.] *Nance's* case [3] assists in showing how the Privy Council was satisfied that the jury which awarded $35,000 could not reasonably have computed the total recoverable damages at more than $22,500, and the Judicial Committee reduced them by one-third to that figure.

[WILLMER L.J. In *Nance's* case [3] the damages were more calculable, depending so much on what the dead man's earnings would have been; but in a case like the present the factors for consideration are so intangible.]

It is submitted that the only way in which an appellate court can apply the settled principles is by considering such information as they have as to the general pattern which emerges from the awards of judges sitting alone in comparable cases, and seeing whether the difference is such that the court can say that the jury's award was out of all proportion. As cases on the quantum of damages do not normally appear in the approved law reports, that pattern has to be extracted from summarised reports in books and newspapers which assist those advising in these cases. These reports show that for cases of total paraplegia—the " wheelchair " case—the normal award has been something between £15,000 and £17,000. In *Waldon* v. *War Office* [4] this court increased damages in such a case from £12,000 to £17,000, but that appears to be the top figure for a " wheelchair " case. In *Smith* v. *Alexander Findlay Ltd.*,[5] this court declined to interfere with an award of £18,000 by Barry J., but said that it was " on the high side." If, therefore, this court considered that £18,000 was on the high side for total paralysis, the same amount awarded to this man of 29, partially paralysed but with, by comparison, much better prospects, is too high and out of all proportion to the facts. [*Stroud* v. *T. F. Maltby Ltd.*[6] and summarised cases in Kemp on Quantum of Damages, Supplement, pp. 27, 32, 398, were also referred to.]

[WILLMER L.J. These are awards by judges sitting alone; but how far is it right for us to impose a standard for juries? If we reduced an award of a jury, there might be a new trial and the next jury might award a similar sum. What then? Can this court go on pitting its judgment against that of a jury? Would not that render the right to trial by jury nugatory?]

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[1] [1951] A.C. 601, 614; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

[2] [1954] 1 W.L.R. 1303, 1305; [1954] 3 All E.R. 94.

[3] [1951] A.C. 601, 617.

[4] [1956] 1 W.L.R. 51; [1956] 1 All E.R. 108.

[5] Not reported, May 7, 1954 (C.A. Judgmts. No. 147).

[6] [1958] 1 Lloyd's Rep. 324.

Only within limits. No one has ever contended that even the verdict of a jury should be unassailable. The court has to take on the task if this jurdisdiction is to be exercised at all.

[Willmer L.J. Another complication is as to what any sum now awarded may be worth in 30 years—a relevant consideration in the case of a man of 29. If the jury took the view that anything they awarded now should be multiplied by two because it would only be worth half in 30 years, would that be a wrong view?]

[Morris L.J. We do not know what the view of the jury is or what they take into consideration. If a jury awarded double that which a judge sitting alone might give, what is then the test?]

Such an award would be "out of all proportion."

[Morris L.J. "Out of all proportion" to what a judge might think; but is it out of all proportion to the facts? Who is to be the judge of that? If 12 citizens chosen at random assess pain and suffering at a certain figure, is the test as to whether it is right that which a judge sitting alone might have thought? The judge might be wrong.]

Some standard has to be applied. In *Flack* v. *Withers* [7] a jury, on January 16, 1959, awarded £18,500 to a boy of 14 who would spend the rest of his life in a wheelchair. That is some indication that in a "wheelchair" case the awards of judges on the general pattern are not out of accord with the views of a jury. But the amount awarded to this plaintiff is too large and should not be allowed to stand.

Martin Jukes Q.C. and *Barry Sheen* for the plaintiff. First, there was no misdirection by the judge. The potential loss of earnings was one of the factors which the jury were entitled to consider, and in view of some rather disquieting answers by the employers the judge's direction on this point might have been even stronger than it was.

Secondly, the test cited by Lord Wright in *Mechanical and General Inventions Co. and Lehwess* v. *Austin and the Austin Motor Co.*[8] is helpful, namely, that "'having regard to all the "'circumstances of the case, the damages are so excessive that "'no 12 men could reasonably have given them.'" "So "excessive" is unqualified by reference to any sort of tariff or standard or norm or pattern of which a jury knows nothing and can know nothing. The norm emerging from the awards of judges is often several years old, whereas the jury come to each case with the fresh mind of the ordinary citizen. This court has said many times that where injuries and future prospects are serious a jury is probably the best tribunal: see *per* Lord Goddard C.J. in *Dolbey* v. *Goodwin.*[9] Juries are almost always granted if asked for in such cases; and if 12 reasonable "men in the "street" are asked to assess damages for injuries, the right approach is not to consider what judges would normally give. If it were so, the jury would be told what judges usually give, and it is well established that that is not to be done.

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[7] [1959] 1 C.L.(Jan.), para. 88.

[8] [1935] A.C. 346, 378.

In Trial by Jury (Hamlyn Lectures, 1956, Stevens & Sons Ltd., at pp. 155–156) Devlin J., discussing the merits of the trial system as between the relative certainty of a judge who follows a pattern and the unpredictability of the jury, said that "the "unique merit of the jury system is that it allows a decision near "to the aequum et bonum to be given without injuring the fabric "of the law because the verdict of a jury can make no impact "on the law." Those views are respectfully adopted as part of the present submissions, and show that one cannot approach this court's problem on the pattern of awards in cases in which juries were not concerned. Awards are not excessive merely because they are large; and applying the general principles to this serious case with all its imponderables—and no one knowing how the jury arrived at their figure—it cannot be said that the figure was so excessive that no reasonable jury could have awarded it.

Sheen following. Though few litigants now avail themselves of the right to trial by jury, it is still a constitutional right, and if more litigants availed themselves of it, the judge's pattern might be on a different level. A pattern emerges because counsel can draw the court's attention to what other judges have done; but if judges could not be told, as juries cannot be told, there might be wide divergences and no pattern.

[ORMEROD L.J. You could hardly insulate judges from the newspapers.]

Skelhorn Q.C. in reply. It is impossible to look at any award in vacuo in deciding whether it is reasonable. It must be related to some pattern.

[WILLMER L.J. What is the reason for the rule that you cannot tell the jury what the pattern is?]

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[9] [1955] 1 W.L.R. 553, 555; [1955] 2 All E.R. 166.

I do not know. The jury, having no yardstick, get no real guidance beyond nebulous phrases about "Do not be extravagant; "be reasonable," and so on. But for the appellate court the pattern should be the starting-point.

Morris L.J. The principal contention raised in this appeal is that an award of damages made by a jury was excessive.

On May 4, 1957, the plaintiff in the action, while riding a motor-cycle, was gravely injured as the result of a collision with a motor-van. He alleged negligence against the defendant. The defendant denied negligence, and alleged that the plaintiff was himself negligent to an extent that, either wholly or partly, caused his injuries.

The decision was made that the trial of the action should be with a jury. It therefore became the province of the jury, first to decide as to liability, and, if they found liability established, to decide what damages should be awarded.

When someone has suffered the torment of having his body so crushed or battered that the whole course of his life will be changed, it is a task of supreme difficulty to endeavour to assess the monetary sum which will fairly compensate him. A judge or jury can but essay to preserve a sense of proportion, of moderation, and of fairness. It will be reasonable to bear in mind what relation the injuries under consideration bear to other injuries to which the misfortunes of life may make man subject. It will be essential to make calm reason gain the mastery over the urges which pity may inspire. It will be necessary to harness those qualities of balanced common sense which form a sure guide to decision. It will be proper to have regard to what a particular sum of money may produce or may secure.

In these days the responsibility of assessing the amounts of damages rests, in the great majority of cases, with judges sitting alone. Some eminent judges have, in recent times, voiced the opinion that determinations by juries would often be helpful. Thus, Singleton L.J. in this court in *Bocock* v. *Enfield Rolling Mills Ltd.*[1] said: "It has been said more than once that a judge "sitting by himself is not in as good a position to assess damages "as are twelve members of a jury. They have an opportunity "of discussing the matter among themselves, and though they "may not have great experience in the matter, twelve heads "should be better than one." In the following year, in *Dolbey*

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[1] [1954] 1 W.L.R. 1303, 1305; [1954] 3 All E.R. 94.

v. *Goodwin*, Lord Goddard C.J. said[2]: "This court is always "reluctant to interfere in these cases, because we know the "difficulty that all judges have in coming to a decision in them. "I think it is about as difficult a task as could possibly be put "on a judge, and so I always feel when I am sitting at nisi "prius. I have often felt that in really serious cases of this "kind it is better to have a jury because the opinion of twelve "people is probably more satisfactory than the opinion of one."

In the present case there was a jury. It is now said that their award was excessive. In considering this matter, the approach of the court is different from its approach in cases tried by a judge alone. Where there is an appeal from the decision of a judge sitting alone, the appeal is by way of rehearing. The rehearing applies to the issue of damages as well as to other issues. But it is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered: see the speech of Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)*.[3] But, if there has been an assessment of damages by a jury, the function of the Court of Appeal on a complaint that the damages are too high or too low is different. Where the order of the court has been that trial is to be with a jury, then twelve jurors have collectively (and, be it remembered, unanimously) to decide on an assessment. On appeal, always assuming that the trial has been properly conducted and that the jury have been properly directed, it is not for the members of the Court of Appeal to seek to substitute their assessment and their judgment for that of the jury; the function of the Court of Appeal is then directed to considering whether or not the figure stated by the jury is out of all proportion to the circumstances of the case. Unless it is, this court must not interfere. The jury do not have to give reasons, and it may be impossible to deduce how the jury have regarded the particular individual features of a claim, such as, for example, in a personal injuries case, pain and suffering, deprivation of the amenities of life, and future possible loss of earnings. To warrant any interference with the award of a jury it is not enough to say that the award is more, or even much more, or less, or even much less, than what the judges of the Court of Appeal would consider to be the appropriate amount. The Court of Appeal will not interfere if the figure is one which a jury, acting properly, might award. Interference will be justified if it is made to appear that the jury must have acted improperly and so have brought about a palpably wrong result. If the figure of an award seems to be outrageous, or so extravagant that no other jury would repeat it, then there might, in some cases, be ground for suspecting that a jury has been partial or perverse. But, as the Court of Appeal will only have the figure, as announced by the jury, to consider, the court will have to decide, on a consideration of the figure itself, whether it appears so excessive or so inadequate that no twelve reasonable jurors could reasonably have awarded it; or, stated otherwise, whether the figure appears to be out of all proportion to the circumstances of the case: see the speech of Lord Wright in *Mechanical & General Inventions Co. Ltd. and Lehwess* v. *Austin and Austin Motor Co. Ltd.*[4]

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[2] [1955] 1 W.L.R. 553, 555; [1955] 2 All E.R. 166.

[3] [1942] A.C. 601, 616; 58 T.L.R. 240; [1942] 1 All E.R. 657.

In the present case we were referred by Mr. Skelhorn, in a most powerful address, to some figures of awards in cases resembling the present one which had been tried by judges alone. He submitted that the award of the jury in the present case should be regarded as being higher than those awarded by judges in comparable cases. Whether this be so or not cannot be in any way decisive in this case.

In cases which are comparable but which are decided by different judges, a certain pattern or level of awards of damages may emerge. If, however, an award of a jury does not seem to conform to such pattern, that is not to prove that the jury is necessarily wrong. The views of juries may form a valuable corrective to the views of judges. The jury will not necessarily have knowledge of any pattern or level which judges have thought to be appropriate, and the jury are not bound by any such pattern or level.

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[4] [1935] A.C. 346, 378.

Of course it is inevitable that members of the Court of Appeal, when considering a complaint against the award of a jury, will formulate individual views as to the figure of damages which they themselves would have deemed appropriate. That will be comprehended within, and will be one part of the process of deciding, whether the jury's award is out of all proportion to the circumstances of the case. It must, however, be no more than a part of that process. The figure of an award by a jury is not to be deemed to be wrong merely because judges might have arrived at a different figure.

Where, therefore, a jury is charged with the responsibility of assessing damages, their conclusion will only be assailed or displaced if attack can be made upon it on the lines that I have mentioned.

With that approach, I now consider the facts in the present case. The jury found in favour of the plaintiff on the issue of liability, and therefore had to assess the figure of damages. The figure of special damages was not much in contest. The injuries sustained by the plaintiff were undoubtedly extremely grave. [His Lordship stated the facts as to the plaintiff's injuries, as set out above, and continued:] Now I mentioned in my approach to the matter that, of course, there must be no misdirection if the award of a jury is to stand. The appeal was brought on two grounds. It was said that there was misdirection, and also it was said that the figure of the general damages awarded to the plaintiff, £18,000, was a wholly erroneous estimate of the damage suffered by the plaintiff and out of all proportion to the facts, and ought to be reduced. But there was one further complaint. It was said that the judge misdirected the jury in that he directed them in terms which suggested that the plaintiff's present employment was only of limited duration, and that after a reasonable time he would have to find other work. [His Lordship read the evidence of the employers' representative, summarised above, and continued:] The jury heard all that evidence, and it seems to me that all that the judge was telling the jury was that, though Nestlé's had treated the man very well, it did not follow that this man's income was safe—" 'for a reasonable time' was " the evidence; and after that he has to shift for himself." It does not seem to me that these words were out of conformity with the evidence given, which showed that Nestlé's were behaving most generously; they had promised to keep him on for a reasonable time, and they were keeping him on. But was his employment safe? Other people might become in authority in the company who were not able to behave so generously; the fortunes of the company might be different; the necessities might change. The judge was merely reminding the jury that the plaintiff's employment was not safe. I do not feel that there was any misdirection.

The main issue, therefore, is whether, on the approach which I have endeavoured to state, the court ought to interfere and say that this award should be set aside.

The judge dealt most carefully with the injuries which the plaintiff has suffered. I do not propose to go through them all in detail. There is no question that they were grave indeed, and Mr. Skelhorn, in his very fair address, has not minimised the gravity of them. [His Lordship read the judge's summing-up in regard to the plaintiff's injuries, and continued:] Then there was another very distressing and serious part of the matter relating to his future sexual life. I do not want to read what the judge said. He described the position quite fairly, and no complaint is made of the treatment of the matter in the summing up. He said that the members of the jury might think that that was a very serious aspect of the matter for a young man of 29.

Mr. Skelhorn submitted most powerfully that this case was different from the cases which are sometimes referred to as "wheel-chair cases." He made that submission when putting before us a comparison between some awards of judges in such cases and the award here. For the reasons that I have given, such comparison cannot be decisive. Mr. Martin Jukes in reply said that though this is not a wheel-chair case, the plaintiff has some afflictions that do not beset those who are condemned to a wheel-chair existence. Mr. Skelhorn says: "Well, at least this "man can go about and can do his work."

The judge was careful to invite the jury to be moderate. [His Lordship read from the summing-up as to damages as set out above, and continued:] The summing-up of the judge, as to which there is no complaint save that to which I have referred and which in my judgment is not substantiated, was a fair and balanced summing-up which left the matter to the jury for their good judgment.

The injuries are undoubtedly grave; the figure of the award is certainly high. On the principles that must guide us, I do not feel that it would be right for us to upset that decision of the jury or to say that their award cannot stand. For these reasons I think that the appeal fails.

Ormerod L.J. I agree that this appeal should be dismissed. The appeal was founded on two grounds. The first one was that the judge misdirected the jury on a question of fact as to the plaintiff's employment. As to that, I agree with everything my Lord has said, and I agree that there is really no substance in that criticism of the summing-up of the judge. The second ground on which the appellant founded this appeal was that, in the circumstances of this case, the figure was altogether too high—so high that this court would be justified in reducing it.

I would not attempt to improve on the appreciation of the difference between the duty of this court in dealing with an appeal on the issue of damages from a judge alone on the one hand and from a judge and jury on the other which has just been made by my Lord. But there is really no issue between the parties in this case as to the test which this court must apply in deciding whether to interfere with the verdict of a jury. It was laid down by Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ltd. (No. 2)*,[5] and cited by Singleton L.J. in *Bocock* v. *Enfield Rolling Mills Ltd.*, when he said[6]: "In *Davies* v. *Powell* "*Duffryn Associated Collieries Ltd. (No. 2)*,[7] Lord Wright con-"sidered cases in which the Court of Appeal should, or ought to, "interfere with a judgment on damages of a judge sitting by him-"self, and said: 'There is an obvious difference between cases "'tried with a jury and cases tried by a judge alone. Where the "'verdict is that of a jury, it will only be set aside if the "'appellate court is satisfied that the verdict on damages is "'such that it is out of all proportion to the circumstances of "'the case. . . .'"

There are many other passages in the reports of cases, both in the House of Lords and of this court, setting out the test to be applied, but they all amount to the same thing, that this court will only interfere if the award of damages is out of all proportion to the circumstances of the case.

The real difficulty in this case, of course, and the real argument, was as to how that test should be applied. Mr. Skelhorn agreed that the injuries in this case were very serious indeed, but argued that they were not as serious as the cases of total paralysis from the waist downwards which have been described for convenience as "wheel-chair cases," and therefore in considering the maximum beyond which no award, even of a jury, should go, it was proper to consider the damages which had been awarded by judges from time to time in what, as I say, have been described as the wheel-chair cases. He relied strongly on the decision of this court in *Waldon* v. *War Office*,[8] where the injured man was approximately the same age as the plaintiff in this case and the injuries were such that he was condemned to spend the rest of his life in a wheel-chair, and this court increased the amount of general damages from £12,000 to £17,000. Mr. Skelhorn argued that this should really be the maximum figure which should be awarded in cases of serious injury of this kind. Also he submitted that, from decisions of judges alone and judges sitting with juries in similar cases, a pattern has emerged which at least determines the standard of reasonableness which must be applied, and the damages in this case were very much in excess of that standard of reasonableness and out of all proportion to the circumstances of the case.

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[5] [1942] A.C. 601.
[6] [1954] 1 W.L.R. 1303, 1306.
[7] [1942] A.C. 601, 616.

Mr. Jukes, on the other hand, argued that here no standard could be applied. The damages were entirely at large. He adopted as part of his argument some words from one of the Hamlyn Lectures recently delivered by Devlin J., when he said that a jury was not supposed to conform to a standard that it cannot know about.

Be that as it may, it is of course well established practice in the courts that a judge in summing up shall give the jury no indication of the kind of figure at which they should arrive in determining damages. It is left to them entirely, and they have to do the best they can from the knowledge they have of the circumstances of the case, being, presumably, reasonable men and women.

But this court has, from time to time, as in this case, the duty of deciding whether a sum awarded by a jury is out of all proportion to the circumstances of the case. For my part, I fail to see how that duty can be discharged unless the court has in mind a general idea of the damages which are being awarded day by day by the courts in cases of this kind. To say that there is a standard or pattern in accordance with which damages are awarded would, in my view, be using language which is much too precise. But it would also, in my judgment, be departing from reality to expect this court to decide whether an award was out of all proportion to the circumstances of the case without having in mind a general comparison with the damages awarded in cases of a similar nature. Clearly the margins of that comparison must be wide, for the cases vary infinitely in their circumstances. One tribunal, be it judge alone or a judge and jury, may take a different view from another of a plaintiff's future earning capacity, or may be differently impressed by the loss of some faculty affecting the plaintiff's enjoyment of life.

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[8] [1956] 1 W.L.R. 51; [1956] 1 All E.R. 108.

But, after considering all these matters, there does emerge, I think, a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case, and that, I think, is how a case of this kind must be approached by this court.

Having regard to the difference in considering on the one hand an appeal from a decision of a judge alone, and on the other hand an appeal from a decision by a jury, and approaching the matter as I have endeavoured to set out, how is the test to be applied in this case? There is no doubt that the injuries were very serious. There was very serious physical impairment, not perhaps so complete as in the wheel-chair cases, but, none the less, very serious indeed. There is apparently the necessity for a serious operation, to which my Lord has referred, to mitigate, so far as possible, the bladder trouble which the plaintiff now has. There is the pain, and the possibility of increasing pain, which he will suffer through the years as the result of the deformity of the spine. There is, of course, the head injury, with the possibility, which fortunately grows less and less as time goes on, of traumatic epilepsy. There is the very serious impairment, to which reference has already been made, of his sexual capacity. It is impossible for us to say what regard the jury had to the various items of incapacity, all of which were put before them very clearly in the summing up of the judge. But, having regard to the over-all picture of the disability and the discomfort this man will have to endure for the rest of his life, and attempting to approach the matter in the way which to me appears to be the proper way, I have come to the conclusion that, although the sum of £18,000 for general damages is in the circumstances of this case a high one, it is not so high as to be out of all proportion to the circumstances of the case. I too, therefore, would dismiss the appeal.

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WILLMER L.J. I have reached the same conclusion, and agreeing, as I do, entirely with what has fallen from my Lords already, I find it quite unnecessary to add any words of my own.

Appeal dismissed with costs.

Solicitors: *Harold M. Storer; White & Co.*

M. M. H.

END OF VOL. II AND OF Q.B. SERIES FOR 1959.

The Mode of Citation of the Volumes of the *Law Reports* for 1959 is as follows:

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